

Legal Security between Its Constitutionalization and the Regulation of Its Concept in the 2020 Constitutional Amendment

Dr. Mecheri Djamel

Mohamed Khider University – Biskra

Email: djamel.mecheri@univ-biskra.dz

Prof. Reffaf Lakhder

Mohamed El Bachir El Ibrahimi University – Bordj Bou Arréridj

Email: Lakhder.reffaf@univ-bba.dz

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Abstract:

The principle of legal security is of great importance in embodying the state governed by law and protecting and guaranteeing rights and freedoms. For this reason, the majority of countries around the world seek to constitutionalize this principle in their constitutions and stipulate it in their various legislations. Algeria, through the 2020 constitutional amendment, confirmed this by stipulating for the first time the principle of legal security, which constitutes an important and noticeable development in the constitutional document. If this indicates anything, it indicates the importance of enshrining the principle of legal security because of the contribution it makes to improving the quality of legal texts as a constitutional objective on the one hand, and ensuring the protection of rights and freedoms on the other.

Keywords: Principle of legal security; Constitutional Amendment 2020; Rule of law; Legislative stability.

Introduction:

The existence of constitutional judiciary is a fundamental factor in establishing the rule of law. As an idea and in practice, it has been closely associated with the growth and development of constitutionalization, which aimed at subjecting the acts of public authorities to a set of rules contained within a text called the Constitution. The Constitution has been regarded as a set of legal rules relating to the structure of the state and the manner in which political authority is exercised within it. It encompasses everything related to the state in its foundation, formation, relationship with its citizens, and the statement of citizens' rights and duties.

To achieve this, an independent institution or body was established to exercise control over the conformity of laws with the Constitution. Therefore, the concept of legal security or legal stability has become associated with the stability of individuals' legal positions and the protection of their acquired rights, since this principle is considered one of the most important foundations upon which the legal state is built. Accordingly, modern constitutional systems are based on providing political and legal mechanisms to ensure the normativity and soundness of laws, whether before their promulgation through committees or by submitting them to

competent bodies. The soundness of legislation before its promulgation constitutes a guarantee of legal security, and this in turn ensures the protection of both individual and state rights.

For this reason, interest in the foundations of legal security has recently increased in legal studies, as it constitutes the proper gateway to achieving the rule of law. Its requirement is the necessity of the stability and consistency of legal rules and preventing legal norms from becoming a source of anxiety and uncertainty. Therefore, whenever the requirements of legal security are available within different legislations, this serves as a strong indicator of legal stability, clarity, precision, and certainty in all legislative provisions.

Like other countries of the world, Algeria established since independence a body responsible for reviewing the constitutionality of laws, namely the Constitutional Council. Successive constitutions and constitutional amendments all agreed on the necessity of providing all the mechanisms required for the functioning of the Constitutional Council. Perhaps the most significant addition in this regard was introduced by the 2016 constitutional amendment through the expansion of the entities entitled to refer matters to the Constitutional Council and the introduction of constitutional review through the plea of unconstitutionality. Subsequently, the 2020 constitutional amendment represented a qualitative leap by establishing the Constitutional Court in place of the Constitutional Council and granting it greater independence in order to achieve effective constitutional review and a stronger embodiment of the principle of legal security.

Based on the foregoing, the following problem may be raised:

To what extent did the 2020 constitutional amendment contribute to consolidating the concept of the principle of legal security through its explicit recognition and constitutional value?

To answer this problem, the study has been divided into two sections. In the first section, we address the concept of legal security and focus on it as the central subject of the study. In the second section, we examine the constitutional basis or constitutional value of the principle of legal security. Accordingly, the nature of the topic requires reliance on the descriptive and analytical methods to study the legal provisions introduced by the 2020 constitutional amendment, particularly with regard to the establishment of the Constitutional Court in place of the Constitutional Council in the 2020 constitutional amendment, while providing a definition of legal security and distinguishing it from certain related concepts on the one hand, and determining its constitutional value through the provisions introduced by the 2020 constitutional amendment on the other. All of this aims at achieving legislative stability, embodying the rule of law, and guaranteeing rights and freedoms.

Section One: The Concept of the Principle of Legal Security

Providing definitions generally falls within the task of legal doctrine, which is primarily concerned with determining the content of an idea, clarifying its dimensions, and grounding it by linking it to one of the fundamental theories in the legal field. The function of the legislator, however, is limited to establishing the legal rules necessary for the functioning of society and the protection of interests deemed worthy of protection by the community.

It follows from the foregoing that the concept of legal security enjoys great importance in all states. To elaborate further, we will discuss the definition of legal security in the first subsection and, in the second subsection, distinguish the principle of legal security from other concepts while mentioning its most important foundations.

First Subsection: Definition of Legal Security

The concept of legal security is relatively recent, and legal and doctrinal studies concerning it remain limited. Nevertheless, some definitions have emerged. We begin with the linguistic and terminological definitions. Legal security is a compound term consisting of two words: “security” and “legal.” Accordingly, we shall first address the meaning of legal security and distinguish it from other concepts, and then discuss the foundations of legal security.

Meaning of Legal Security:

The principle of legal security is one of the most important objectives that law seeks to achieve, and it encompasses a set of principles and rights associated with it. Therefore, doctrinal definitions of this principle have varied.

Legal security means that legal situations arising from any human activity are clear and not exposed to surprises or sudden changes. Accordingly, all individual activities must be clearly defined, enabling individuals to foresee the consequences of their actions in advance without the need for others to guide them in this regard.¹

As for the terminological definition, some define it as the necessity for public authorities to ensure a degree of relative stability in legal relationships and a minimum level of stability in various legal positions, with the aim of spreading security and reassurance among the parties to legal relationships, whether public or private legal persons.² Accordingly, individuals may act freely and confidently in the stability of the legal rules and systems existing at the time they undertake their actions and organize their affairs, without being exposed to sudden surprises emanating from public authorities that could undermine confidence or disrupt such stability.³ Others define it as the right of natural and legal persons to know the applicable legal rules, the right to be tried before an impartial and independent judge, the right to fair procedures before the courts, and the right not to be subjected except to judgments proportionate to the committed act. This right also imposes various obligations on the legislator, including the requirement that the law be understandable.⁴

Another doctrinal trend defines it as the exclusion of the risk of instability and the repercussions of sudden changes in legal rules, particularly concerning the protection of rights and freedoms. Accordingly, it constitutes a safeguard and protection against arbitrariness of authority and the unpredictability of rulings by delineating the boundaries between what is prohibited and what is permitted.⁵

From a political perspective, legal security is viewed as a guarantee of citizens’ freedom. In its origin, legal security is a political concept that signifies the absence of arbitrariness. More precisely, it means that governmental decisions affecting citizens should not be arbitrary. In a society where arbitrariness prevails, citizens cannot be free.⁶

Second Subsection: Distinguishing Legal Security from Other Concepts

To complete the concept of legal security and further clarify its meaning, it is necessary to demonstrate its distinctiveness by presenting the subtle differences between it and certain concepts such as justice and material security, as follows:

A- Legal Security and Judicial Security

Judicial security, in its broad sense, consists of confidence in the judicial authority and in judges, and reassurance regarding the judgments, decisions, and orders they issue. This is because, in a state governed by law, the judiciary is the authority responsible for protecting individuals' rights and freedoms and for achieving a balance between society's right to preserve its social security and the individual's right to a fair trial.⁷ This overlaps with the right to personal security, which requires that individuals not be subjected to arbitrary arrest or psychological or physical torture⁸

In its narrow sense, judicial security is linked to the function of supreme courts in ensuring the unification of judicial interpretations and the creation of judicial unity. At this level, it can be said that it serves two fundamental purposes: ensuring legal and judicial consistency, and ensuring quality as well.⁹

It follows from the foregoing that judicial security is directly related to legal security and forms part of it, since judicial security encompasses only the procedural aspect of the legal rule. This means that the concept of legal security is broader and includes judicial security within it.¹⁰ In this regard, the Algerian constitutional framers, through the preamble of the 2020 constitutional amendment, mentioned the term democratic security immediately after legal security because democratic organization is closely linked to the principle of legal security.

B. The Principle of Justice and Legal Security: The general concept of justice is a human conception that focuses on achieving balance among all members of society in terms of rights, and this conception governs systems and laws. Justice is an essential condition for achieving legal and judicial security. Justice is considered an idea with an ethical standard that includes interrelated principles and conditions among themselves. Accordingly, legal security means that legal rules are certain and clearly defined in their regulation of legal positions and that they guarantee the security of outcomes so that every individual can anticipate these outcomes and base their actions upon them. Thus, every individual is able, in advance, to foresee the results and consequences of their actions in terms of their rights and obligations. It becomes evident that there is a harmonious relationship between justice and legal security, meaning that what is established for the achievement of legal security is generally not rejected by justice as long as the established rule is not contrary to justice. It may therefore be said that legal security and its mechanisms constitute an important means of remedying any breach that has occurred to justice and its legal heritage.¹¹

C. Legal Security and Material Security: Material security refers to security measures designed to prevent unauthorized access to facilities, equipment, and resources and to protect individuals and property from harm. Examples include intellectual security, economic security,

and health security. Criminal law, in particular, is considered a preferred means of protecting material public security.¹² It may also be defined as the set of economic and social rights stipulated by the constitution, which obliges the state to protect and guarantee them for individuals in order to safeguard state security and the stability of its entity.³ Accordingly, it may be said that adopting legal security within legislation may serve as an indirect means of enhancing material security and the resulting protection of individuals' lives and freedoms.

There is also the concept of legitimate expectation or legitimate trust, which is one manifestation of the principle of legal security aimed at ensuring the stability of legal systems within society. Likewise, the concept of the rule of law constitutes the foundation of governance, as the state must be subject to the law, thereby establishing what is known as a state governed by law.¹³

Third Requirement: Foundations of Legal Security

Legal security is based on a set of fundamental foundations through which it achieves its objectives. Accordingly, we shall focus primarily on legal stability, accessibility of the law, and finally the predictability of the law.

1. Legal Stability: This means that legislation should remain stable and in force for a longer period in order to ensure the stability of transactions and conduct. Frequent amendments that affect individuals' behavior should be avoided because the law regulates social conduct and must therefore reflect the requirements of society.¹⁴ Whenever a legal rule is stable, it generates stability in personal rights and legal positions. Consequently, legal rules must be certain and clearly defined in their regulation of legal positions.

To achieve this, various mechanisms have emerged throughout different eras, beginning with the sanctification of legal texts and later evolving into diverse mechanisms recognized by laws and adopted by legislative systems. Among these is the recognition of legislation as the official source of law while observing several principles that ensure stability, such as formal requirements for the enactment of laws, prescription, and the authority of *res judicata*. Legal stability therefore contributes both to the formal stability of legal rules and to their substantive stability through their acceptance by society and by those to whom they are addressed.¹ In this regard, it should be noted that the constitutional framers, through Article 160 of the 2020 constitutional amendment, affirmed the possibility of parliamentary oversight of the government concerning any matter of national importance as well as the implementation of laws, all with the aim of achieving legal security.

2. Accessibility of the Law: This refers to the physical accessibility of the law, meaning that legal rules must be published in order to be applicable to individuals and binding upon them. The law must not remain secret or restricted to a particular group of individuals. The Official Gazette serves as a guarantee for the publication and promulgation of laws. Accessibility also includes intellectual or cognitive accessibility, namely the ability to understand the meaning of legal rules through ensuring the quality of legislation by observing formal and substantive requirements during the legislative process.¹⁵

This is reflected in the state's exercise of its public authority through the enactment and publication of legislation. This matter was regulated for the first time in the 2020 constitutional amendment within the chapter concerning constitutional duties, as a complement to the principle that ignorance of the law is no excuse, a principle recognized in all constitutions and subsequent amendments. This is embodied in Article 78, paragraphs 1 and 2, as well as in the affirmation that laws and regulations may not be invoked before their publication. All of these elements constitute a basis for knowledge of the law and, consequently, for the realization of the principle of legal security.¹⁶

3. Clarity and Predictability of the Law: The clarity of legal rules is of great importance in facilitating their understanding by those subject to them, enabling them to know their rights and obligations. This is achieved through clear legal drafting that is easy for those concerned to understand and, secondly, through the possibility of its application by the judiciary, which is consistent with the essence of the principle of legal security.¹⁷ The fundamental idea underlying legislative drafting is that the legislator should express what is intended with precision, clarity, and brevity. This is the objective of modern codification, which seeks simplicity of expression and clarity of purpose.¹⁸

As for the concept of legitimate expectation in relation to the law, it presupposes that the state should not unexpectedly frustrate the legitimate expectations of those subject to the law, expectations that are objectively based on state policy and its legal framework. In other words, every person has the right to clear legislative or regulatory texts that precisely define the objective they regulate. Predictability in the field of subjective rights means that the regulation of citizens' activities in various areas of life should be clear and free from unexpected changes resulting from laws or regulatory decisions that contradict their legitimate expectations based on objective foundations. All of this depends on the most important element, namely political stability.¹⁹

Some jurists add the concept of the rule of law, which means that public authorities and individuals alike are subject to the same law. Others refer to the concept of natural law, founded upon natural justice, which consists of a set of fixed and unwritten rules applicable to all individuals in every society because their source lies in nature itself. To achieve this, society must enact laws and legislation to preserve the application of justice among people.²⁰

Second Section: The Constitutional Basis or Value of the Principle of Legal Security

Legal systems differ regarding the constitutional entrenchment of the principle of legal security. Some legal systems do not explicitly recognize this principle, whereas others expressly enshrine it. Accordingly, the first requirement will examine the explicit recognition of the principle of legal security, while the second requirement will address its implicit recognition.

First Requirement: Explicit Recognition of the Principle of Legal Security

Although only a limited number of constitutions explicitly provide for the principle of legal security, some constitutions—particularly those of European states—have expressly enshrined this principle. The German legislator is considered among the first to have established legal

security as a constitutionally recognized principle in 1949, linking it intrinsically to the principle of the rule of law.²¹

Likewise, the Portuguese Constitution of 1976, as amended, refers to the principle in Article 282(4), which provides:

“The Constitutional Court may limit the effects of a declaration of unconstitutionality where this is necessary for purposes of legal certainty or for the administration of justice, provided that the reasons for doing so are expressly and specifically stated in the decision.”²²

This demonstrates an explicit reference to the principle of legal security, since the term “legal certainty” is synonymous with the principle of legal security. The Spanish Constitution of 1978 also expressly recognizes this principle through Article 9(3), which provides that:

“The Constitution guarantees the principle of legality, the hierarchy and publication of legal norms, the non-retroactivity of unfavorable provisions, legal security, the accountability of public authorities, and the prohibition of arbitrariness by public authorities.”²³

In Algeria, unlike the previous situation, the 2020 constitutional amendment confirmed the constitutional recognition of the principle of legal security. The preamble states that the Constitution guarantees the separation and balance of powers, judicial independence, legal protection, oversight of public authorities, and the guarantee of legal and democratic security.²⁴ Furthermore, Article 34(4) provides:

“In order to achieve legal security, the State shall, when enacting legislation relating to rights and freedoms, ensure its accessibility, clarity, and stability.”

Likewise, Article 55 guarantees the right of access to information. Consequently, Algeria has become one of the leading states in strengthening the rule of law and consolidating the foundations for protecting the principle of legal security, as well as its constituent elements, whose availability indicates the existence of sound legal security.

Second Requirement: Implicit Recognition of the Principle of Legal Security

In addition to the foregoing, some constitutions recognize the principle of legal security implicitly rather than explicitly. They do not directly refer to the principle itself but instead refer to certain of its constituent elements, such as the non-retroactivity of laws, respect for acquired rights and freedoms, and the stability of legal positions. Among these constitutions is the German Constitution.

for the year 1949, which linked this principle to the principle of the rule of law, which implicitly means control over state authority, clarity of laws, and judicial protection of individual rights, where it is necessary to ensure the clarity and transparency of legal rules so that the citizen can control his legal life.

Accordingly, we observe that the German Constitution adopted this principle but did not explicitly stipulate it in the constitutional document. Likewise, the European Court of Human Rights adopted it, where the European judge considered legal certainty to be one of the fundamental principles that must be present in European law, and a basic element in its jurisprudence; however, it left member states free to apply or not apply the principle of legal certainty in areas governed by domestic law.²⁵

As for the French Constitutional Council, it oscillated between implicit acceptance and rejection through its decisions in this regard, as in some rulings it refused to explicitly recognize the principle of legal certainty, while in others it implicitly acknowledged it. For example, it addressed Article 4 of the Budget Law of 1996, which included the cancellation of income tax reduction with retroactive effect, in violation of the principle of legal certainty and thus of the Constitution.²⁶

In Egypt, the Egyptian Constitution of 2014 did not stipulate the principle of legal certainty, but it referred to it implicitly. Article 1 of the Constitution stipulated the principle of the rule of law, relying on Article 94 of the Constitution, which implicitly indicates some manifestations of legal certainty.⁴ In the same direction, implicit references to the principle can also be found in some constitutional provisions of the Iraqi Constitution of 2005, including Article 19, which states that laws shall not have retroactive effect unless otherwise stipulated, and this exception does not include tax and fee laws, and that criminal law shall not apply retroactively unless it is more favorable to the accused.²⁷

As for Algeria, we note that the constitutional legislator did not address the principle clearly in the Algerian Constitution of 1996 or its subsequent amendments. Rather, its recognition came implicitly through the adoption of some constitutional foundations, foremost among them the supremacy of the Constitution, non-retroactivity of laws, and respect for acquired rights and freedoms. However, the constitutional amendment of 2016 included new elements related to legal protection, namely the principle of separation of powers and the independence of the judiciary, as confirmed by Article 15/1. Moreover, Article 188 represented one of the most important means available to individuals to raise the unconstitutionality of laws before the judiciary, providing greater protection for legal certainty and safeguarding constitutional rights and freedoms.³

Conclusion

The constitutional entrenchment of legal certainty and its elevation to a constitutional principle constituted a major turning point in the constitutional reform process of the state, as its establishment became a guarantee for the broad fundamental rights and freedoms enshrined in the Constitution, including the principle of legal certainty. Given that one of the established principles of constitutional review is the presumption of validity of legislation under what is known as the presumption of constitutionality, this presumption, although not absolute, protects legislation from the scrutiny of constitutional oversight. Accordingly, the presumption of constitutionality becomes a fundamental guarantee for legislation in the face of constitutional court review, which plays an effective role in this regard, in addition to its role in protecting the principle of legal certainty, which has become an urgent necessity sought by most legal systems. This is what the constitutional legislator aimed at through the Constitutional Council and then the Constitutional Court in the 2020 constitutional amendment, by using several mechanisms such as total or partial annulment of laws and regulations that are inconsistent with the Constitution, as well as interpretative reservations.

We have concluded through this research paper a set of findings as follows:

- The principle of legal certainty is characterized by modernity, which is reflected in its content and definition, as legal scholars have not agreed on a comprehensive and exclusive definition, nor on its constituent elements.
- The role of constitutional judiciary in achieving the principle of legal certainty is no less important than the role of the legislative authority; while the legislative authority enacts legislation, the constitutional court ensures its legitimacy and may annul or suspend its effects.
- If the annulment of laws is necessary to establish constitutional legality, it must not be at the expense of individuals' right to legal certainty.
- Legal certainty has multiple forms, meanings, and dimensions, all of which revolve around a set of rights and principles that must be respected to ensure a sound legal system free from defects.
- The principle of legal certainty is one of the most important foundations upon which the legal state is built.
- The constitutional amendment of 2020 enabled Algeria to align with the requirements of modern states in strengthening democratic principles under the rule of law, by establishing mechanisms to protect citizens and embody the principle of legal certainty, which is considered a safeguard for rights and freedoms.

Accordingly, we propose the following recommendations:

- We call on the Algerian constitutional legislator to consider legal certainty a fundamental human right and to grant it constitutional value.
- The principle of clarity of legislation should be adopted as a constitutional principle, as it is the basis for achieving legal certainty on the one hand and protecting rights and freedoms on the other. Accordingly, we recommend that the constitutional judiciary begin reviewing legislative drafting from the outset to ensure its intended purpose and proper application by all.
- It would be preferable for judges of the Constitutional Court to accept challenges to laws and regulations if they violate the principle of legal certainty, as it is a guarantee of individuals' rights and freedoms.
- Ensuring a degree of stability and consistency in legislation related to rights and freedoms.
- Legal certainty requires continuous adaptation between legal rules and societal needs, and must keep pace with new developments and concepts to meet citizens' needs and guarantee them within the framework of the rule of law.
- The principle of legal certainty can only be realized under guarantees; otherwise, it remains empty rhetoric. One of its most important guarantees is the independence of the judiciary, which must rise to its role as an independent authority ensuring rights and freedoms.

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