Studia Prawnicze. Rozprawy i Materiały 2020, nr 1 (26) • Studies in Law: Research Papers 2020, No. 1 (26)
ISSN 1689-8052 • e-ISSN 2451-0807

DOI: 10.34697/2451-0807-sp-2020-1-004

Ramona Duminică
PhD, University of Piteşti, Romania
ORCID: 0000-0002-3416-2329
duminica.ramona@gmail.com

The principle of non-retroactivity of the law in the Romanian civil code

The non-retroactivity of the law – a key component of the legal certainty

The legal security has a complex content, in the meaning that it comprises two large categories of rules. On the one hand, are those aiming the quality of the law and, on the other hand, those rules insuring the stability of the legal situations, namely the non-retroactivity of the law, its accessibility and predictability and of the state actions.

The principle of the non-retroactivity of the law has a rational fundament, in the meaning that it cannot require to a subject of law to answer for a behaviour had previously to the entrance into force of a law.

The legal literature has stated in this meaning that "if a person who obeys the order of the law could be disturbed on the grounds that a later law has changed the terms of the previously existing regulation, the law would lose all power, because no one would even dare to execute the orders of the law for fear of some acts that, although made legitimate, would then be criticized by a new and unknown law"[1].

Also, the Romanian doctrine correctly argued that "they would reach arbitrariness, disappearing the confidence of the subjects of law in the concept of social order"[2] and that "there could be no certainty for the recipients of the legal norm if, as long as a law is in force, and they complied with its

[1] F. Terré, *Introduction générale au droit*, 8e édition, Dalloz, Paris 2009, pp. 469–470.

[2] E. Chelaru, *Teoria generală a dreptului civil în reglementarea Noul Cod Civil*, C.H. Beck Publ.-house, Bucharest 2014, p. 23.

provisions, the acts concluded according to the legal provisions could be put into question after its repeal. Or, in other words, the law is an order of the legislator, and an order can only be valid for the future; citizens cannot be expected to obey a law they could not know, because it did not yet exist"[3].

Among other things, the observance of legal certainty also implies the obligation not to prejudice certain legal situations consumed before the entry into force of a new law. The law shall not be converted into an instrument of "correction" of the past. For these reasons, we consider that the non-retroactivity of the law is an essential component of the principle of legal certainty[4].

In its turn, the Romanian Constitutional Court has stated in its jurisprudence that "allowing a normative act to have retractive effects would lead to the very denial of the principle of the rule of law"[5] and that "even if the legislator justifiably wants to remove or mitigate some situations, he cannot achieve this through a law that has a retroactive feature, but must seek appropriate means that do not contradict with this constitutional principle"[6].

Thus, the principle of the non-retroactivity of the law is seen as a guarantee of the stability of the legal order, an essential guarantee of the human rights and especially of the fundamental freedoms and security of the person.

The consequences of the constitutional provision of the principle of non-retroactivity of the law

In Romania, before the entrance into force of the Constitution in 1991, the principle of the non-retroactivity of the law was stated by Art 1 of the Civil Code of 1864 according to which "the law orders only for the future, it has no retroactive power", being considered an aspect of legality.

The consequences of the fact that it was not regulated at the constitutional level consisted mainly in the fact that the principle obliged only the one who applied the law, and not the legislator who could give retroactive feature to the law, provided that this character was expressly specified, and the laws interpretative principles had, in principle, a retroactive effect, although they could not be adopted without limits.

---

3 L. Stângu, *Neretroactivitatea legii în statul de drept*, in the "Constitutional Court Bulletin" 2010, no 1, p. 7.

4 E. Chelaru, R. Duminică, *Legal security and non-retroactivity of laws in the jurisprudence of the Romanian Constitutional Court*, paper presented at the "International Congress on European and Comparative Constitutional Law", Madrid 2019.

5 Constitutional Court Decision No 26/2012, published in the Official Gazette of Romania, Part 1, No 116/15 February 2012.

6 Constitutional Court Decision No 26/2012, published in the Official Gazette of Romania, Part 1, No 116/15 February 2012.

Currently, the non-retroactivity of the law and its exceptions are expressly stated by Art 15 Para 2 of the Romanian Constitution revised in 2003: "The law shall only act for the future, except for the more favourable criminal or administrative law".

The effects of constitutionalizing this principle is one of the most "severe" ones, as expressed by the Romanian Constitutional Court which stated several times the universality of this principle: "the principle of non-retroactivity is valid for all laws, regardless of their area of application"[7], the notion of law being used in its broad meaning, by any normative act. Thus, the principle became mandatory not only for the judge enforcing the law, but also for the legislator, who is obliged to respect it in the process of legislation.

The doctrine[8] underlined that the main effect[9] consists of the fact that no law may derogate from this principle, the only exceptions being expressly stated by the Constitution, namely the more favourable criminal or administrative laws, whose retroactivity becomes a constitutional principle, the legislator not being able to derogate from it, being in the presence of a mandatory retroactivity.

Starting from the fact that the constitutional provision of the non-retroactivity is contradictory to the Romanian constitutional tradition, without denying the benefices brought to the rule of law, the risks generated by constitutionalizing this principle have been emphasized[10], in the meaning that the non-retroactivity, given the feature of stability, maybe excessive, given to the legal rule, may be an obstacle in the evolution of the law.

But, under the conditions in which in our country the legislative inflation phenomenon is not neglectable, and the rule of law proves unable to insure the predictability and accessibility of the law, we consider that this constitutional provision of the non-retroactivity of the law is a solution created to contribute to the consolidation of the state of law.

In the same meaning, the Constitutional Court in one of its decisions stated that "the effects of registering the principle of non-retroactivity in the Constitution are so severe and probably, this is why this solution is not seen in many countries but, in the same time, its mentioning as a constitutional principle is justified by the fact that it insures under better circumstances the

---

7 Constitutional Court Decision No 90/1 June 1999, published in the Official Gazette of Romania, Part 1, No 489/11 October 1999.

8 D.C. Dănişor, I. Dogaru, G. Dănişor, *Teoria generală a dreptului*, C.H. Beck Publ.-house, Bucharest 2008, pp. 408–409.

9 R. Duminică, *Criza legii contemporane*, C.H. Beck Publ.-house, Bucharest 2014, pp. 109–110.

10 D.C. Dănişor, *Drept constituţional şi instituţii politice*, Vol. 1: *Teoria generală*, C.H. Beck Publ.-house, Bucharest 2007, p. 564.

legal security and the trust of citizens in the legal system, as well as due to the fact that it blocks the disregard of the separation between the legislative power, on the one hand, and the judiciary or the executive power, on the other hand, thus contributing to the consolidation of the rule of law"[11].

Given that we are in the presence of a constitutional principle, the non-retroactivity of the law is mandatory for all legal areas, not only for those expressly stating it, as in the case of the civil law, as well as for all normative acts.

The principle of the non-retroactivity of the law in the Romanian Civil Code

1. Notion, regulation, fundament and criteria for non-retroactivity

The Romanian Civil Code entered into force on the 1st of October 2011, it states the non-retroactivity of the civil law in Art 6 Para 1 according to which "the civil law shall be applicable for as long as it is in force. It has no retroactive power".

The normative solution stated by the current Civil Code is not new, but it is in the spirit of the previous provisions, Art 1 of the Civil Code of 1864 expressly stating this principle, as above mentioned. Moreover, no other approach was possible, given that we are in the presence of a principle enshrined in the Constitution. The Constitutional Court reiterated in its case-law that "the principle of non-retroactivity of civil law is constitutional and has absolute value, in the sense that the legislator cannot institute any derogation, and it means that the civil law applies to all legal situations born after its entry into force, and not past legal situations, consumed (*facta praeterita*)"[12].

The reason for stating this principle is found in the need of not allowing the legislator that, in conjunctural situations, to generate insecurities regarding the rights born and the legal situations that have already produced their effects under the rule of regulations in force at that time, namely by the adoption of certain laws with retroactive applicability modifying them in a way impossible to be foreseen on the date they were born[13].

The judicial literature defines the principle of non-retroactivity as being a fundamental rule of law expressed by the adagio *tempus regit actum*, according to which the new law shall apply to all those legal situations that

---

[11] Constitutional Court Decision No 9/1994, published in the Official Gazette of Romania, Part 1, No 326/25 November 1994.

[12] Constitutional Court Decision No 755/2014, published in the Official Gazette of Romania, Part 1, No 101/9 February 2015.

[13] D. Chirică, *O privire asupra noului Cod civil. Titlul preliminar*, "Pandectele Române Magazine" 2011, no 3, pp. 113–139.

are constituted, modified, extinguished and produce all their effects after its entry into force[14].

This definition emphasizes the classical situation of different legal situations constituting, modifying, extinguishing and generating all effects under the rule of the same law, but in the case of legal situations that extend for as long as two or more civil laws are in force, it is necessary to establish criteria for non-retroactivity.

Regarding these criteria, the doctrine has exposed several theories, such as: the theory of the rights earned, the theory of the immediate application of the new law, the theory of consumed, fulfilled or achieved facts, the normativity theory etc.

The classic theory of the earned rights is characterized by two main elements, namely:

a) It reveals the fundamental identity between the principle of the non-retroactivity of the new law and the principle of the earned rights, in the meaning that the new law is not retroactive if it harms the earned rights instead of complying with them;
b) It admits that the new law may be retroactive when the earned rights are not concerned.

But the application of this theory also has a series of flaws. Thus, it has been shown that there are no precise and sufficient criteria to establish what an "earned right" really is and that this theory does not solve the issue of the application of the new law or that of the conflict of laws regarding the non-patrimonial rights[15].

The theory of the immediate application of the new law, drafted by Paul Roubier[16] states that in the case of regulating the same legal situation by successive laws, three solutions are possible: the retroactivity of the new law; the immediate application of the new law; the survival of the old law. In order to apply this theory, one draws, on the one hand, the distinction between dynamic and static elements of a legal situation, and on the other hand, on the distinction between legal and contractual situations, giving rise to a new concept, that of "legal situation"[17].

---

[14] G. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Universul Juridic Publ.-house, Bucharest 2005, p. 48; G. Boroi, *Drept civil. Partea generală*, 2nd Edition, All Beck Publ.-house, Bucharest 1999, p. 18.

[15] M. Nicolae, *Soluţii la conflictele de legi în timp – în căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă* (I), RRDP 2012, no 6, pp. 162–206.

[16] P. Roubier, *Le droit transitoire (Conflits des lois dans le temps)*, 2eme éd., Dalloz et Sirey Publ.-house, Paris 1960.

[17] See also: O. Motica, *Principiile aplicării legii civile în timp în lumina noului Cod civil*, "West University of Timisoara Annals" 2013, pp. 195–196.

Over time, both under the rule of the Civil Code of 1864 and of the current Civil Code, most Romanian doctrinaires[18] have applied this theory and have established two principles for the application of the civil law in time: the principle of non-retroactivity and the principle of the immediate application of the new law, as well as an exception from them: the survival of the old civil law. Thus, the legal situations which may practically emerge have been classified into:

– *Facta praeterita* (constitutive, modifying or extinguishing facts of legal situations made entirely before the entry into force of the new law, as well as the effects produced by that legal situation before this moment) governed by the old law;
– *Facta pendentia* (the legal situations in course of constitution, modification or extinguishment at the moment of the entry into force of the new law) governed by the new law;
– *Facta futura* (the legal situations to be born, modified or extinguished after the entrance into force of the new law and the future effects of the past legal situations) governed by the new law;

In its turn, the theory of the consumed fact, based on an objective criterion, has different options for application. This theory is based on the distinction and opposition between the fulfilled and unfulfilled facts. The first are subjected to the law under which were established, namely the old law, while the unfulfilled ones are subjected to the new law. Although it does not fully solve the problem of the future effects of the fact consumed, produced after the entry into force of the new law, however, its scope is larger, being applicable also to non-patrimonial rights. Although it does not fully solve the problem of the future effects of the fact consumed, produced after the entry into force of the new law, however, its scope is larger, being applicable also to non-patrimonial rights[19].

Finally, the normativity theory proposes as criterion for retroactivity or non-retroactivity the structural analysis of the legal norm at the moment of the conclusion or of the occurrence of the legal act or fact.

However, no matter what theory they adhere to, none of them fully meets the requirements of legislative technique. Thus, it has been shown in regard to the application of these theories that they are mutually excluded but are often complementary and tend to provide a common answer to the same issue of application of the law in time, even if they start from different

---

[18] G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea generală*, Hamangiu Publ.-house, Bucharest 2011, pp. 21–22; O. Ungureanu, C. Munteanu, *Drept civil. Partea generală în reglementarea noului Cod civil*, Universul Juridic Publ.-house, Bucharest 2013, pp. 70–74.

[19] M. Nicolae, *op. cit.*, pp. 146–172.

premises[20]. Also, "solving conflicts of laws in time depends not only on the specific situation of the successive norms, but also on the will of the legislator, express or tacit, which understands to appeal to one of the theories invoked, depending on the context, through transitional rules"[21].

Regarding the legislator of the Romanian Civil Code, it shall be noted that he has solved the issue of the criterion of non-retroactivity by invoking Art 6 of the normativity or structuralist theory. Thus, the criterion consists in the judicial positive or negative reassessment or reappreciation of the past act or deed, by the new law. Therefore, it has been shown that only the new law will be retroactive which: "binds, attaches new legal consequences to an act or deed committed or produced before its entry into force" or "denies the legal consequences attributed by the law in force at the time of the commission or to produce the act or the fact it consumes"[22].

2. The application of the principle of non-retroactivity in the Civil Code

As above shown, the principle of non-retroactivity of the civil law is expressly stated by Art 6 Para 1 of the Civil Code and the applications for this principle are to be found in Art 6 Para 2 (text reiterated by Art 3 of the Law No 71/2011[23]) and in Art 6 Para 3 of the same code (text reiterated by Art 4 of the Law No 71/2011).

Art 6 Para 2 of the Civil Code states an application of the principle of non-retroactivity in the area of the effects of the legal act. According to the legal provisions, "Legal acts and deeds concluded or, when appropriate, committed before the entrance into force of the new law cannot generate other effects than the ones stated by the law in force at the moment of the conclusion or, where appropriate, of their occurrence".

From the legal text it results that the new law cannot attribute its effects to the past legal situations, nor to the judicial acts or deeds from which they originate, namely it cannot attribute to them effects that they could not produce under the rule of law under which they were born, committed or produced.

Art 6 Para 3 of the Civil Code also refers to the application of the principle of non-retroactivity of the civil law in the area of the conditions for

---

[20] Ş. Diaconescu, *Unele considerații cu privire la conflictele de norme civile în timp*, "Romanian Private Law Magazine" 2014, no 14.

[21] *Ibidem*.

[22] M. Nicolae, *Drept civil...*, *op. cit.*, p. 451.

[23] Law No 71 of 3rd June 2011 for the application of the Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, No 409/10 June 2011.

validity of the civil legal act. Thus, it states that "the legal acts null, annullable or affected by other causes of inefficiency at the entry into force of the new law are subjected to the provisions of the old law, not being considered valid or, where appropriate, efficient according to the provisions of the new law".

From these provisions it results that at the entrance into force of the Civil Code, the legal acts null, annullable or affected by other causes of inefficiency, stated by the Civil Code of 1864, as well as by other normative acts, are to be subjected to the provisions of the old law. These cannot be considered valid or, where appropriate, efficient according to the Civil Code or to the provisions of the Law No 71/2011.

Both the Civil Code, as well as the Law No 71/2011 have numerous references to the principle of non-retroactivity of the Civil Code in different areas of activity[24]. As example, we shall mention a few of them stated by the Law No 71/2011:

– Art 13 according to which the rights of personality are subjected to the law in force at the moment of their performance, while any harm brought to these rights shall be subjected to the law in force at the time of its occurrence;
– Art 19 according to which the provisions of Art 252-257 of the Civil Code stating the protection of non-patrimonial rights shall apply only to the offences committed after its entrance into force;
– Art 25 Para 1 states that the validity of the marriage concluded before the entrance into force of the Civil Code shall be established according to the provisions of the law in force at the moment of its conclusion;
– Art 60 states that the validity and legal effects of the clause for perpetuity stated by a convention, as well as the validity of such clause stated by a will shall be governed by the law in force at the moment of the convention's conclusion.
– Art 77 states that the records in the land book performed as result of legal acts or deeds concluded or committed prior to the entrance into force of the Civil Code shall generate the effects stated by the law in force at the moment of the conclusion of these acts or of the commission of these deeds, even if these writings are being performed after the entrance into force of this Code;
– Art 102 Para 1 states that "The contract shall be subjected to the law in force at the moment of its conclusion in everything regarding its conclusion, interpretation, effects, performance or cessation" etc.

[24] E. Chelaru, *op. cit.*, pp. 31–32.

Conclusions

In the spirit of the Civil Code of 1864, based on the Napoleonian Civil Code, the current Romanian Civil Code expressly states the principle of non-retroactivity of the civil law. Also, through the Romanian Constitution of 1991, revised in 2003, this principle has been constitutionally stated, without regulating the criteria for non-retroactivity. Under these conditions, the task for their identification was attributed to the Constitutional Court and to the doctrine.

Even if the constitutional mention of the non-retroactivity of the law contravenes with the Romanian constitutional tradition, one cannot deny the benefices brought to the rule of law. Given the fact that in Romania the phenomenon of the legislative inflation is not neglectable, and the state proves unable to provide the predictability and accessibility of the law, we consider that this constitutional statement of the non-retroactivity of the law is, without any doubt, the solution created to ensure the elimination of all abuses in the legislation process.

Bibliography

Beleiu G., *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Universul Juridic Publ.-house, Bucharest 2005.

Boroi G., *Drept civil. Partea generală*, 2nd edition, All Beck Publ.-house, Bucharest 1999.

Boroi G., Anghelescu C.A., *Curs de drept civil. Partea generală*, Hamangiu Publ.-house, Bucharest 2011.

Chelaru E., *Teoria generală a dreptului civil, în reglementarea Noul Cod Civil*, C.H. Beck Publ.-house, Bucharest 2014.

Chelaru E., Duminică R., *Legal security and non-retroactivity of laws in the jurisprudence of the Romanian Constitutional Court*, paper presented at the "International Congress on European and Comparative Constitutional Law", Madrid 2019.

Chirică D., *O privire asupra noului Cod civil. Titlul preliminar*, „Pandectele Române Magazine" 2011, no 3.

Dănişor D.C., *Drept constituţional şi instituţii politice*, Vol. 1: *Teoria generală*, C.H. Beck Publ.-house, Bucharest 2007.

Diaconescu Ş, *Unele consideraţii cu privire la conflictele de norme civile în* timp, "Romanian Private Law Magazine" 2014, no 6.

Duminică R., *Criza legii contemporane*, C.H. Beck Publ.-house, Bucharest 2014.

Motica O., *Principiile aplicării legii civile în timp în lumina noului Cod civil*, "West University of Timisoara Annals" 2013.

Nicolae M., *Soluţii la conflictele de legi în timp – în căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă* (I), "Romanian Private Law Magazine" 2012, no 6.

Nicolae M., *Drept civil. Teoria general*, Vol. 1: *Teoria dreptului civil*, Solomon Publ.-house, Bucharest 2017.
Roubier P., *Le droit transitoire (Conflits des lois dans le temps)*, 2eme éd., Dalloz et Sirey Publ.-house, Paris 1960.
Stângu L., *Neretroactivitatea legii în statul de drept*, "Constitutional Court Bulletin" 2010, no 1.
Terré F., *Introduction générale au droit*, 8e édition, Dalloz, Paris 2009.
Ungureanu O., Munteanu C., *Drept civil. Partea generală în reglementarea noului Cod civil*, Universul Juridic Publ.-house, Bucharest 2013.

Legislation

Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, No 511/ 24 July 2009.
Law No 71 of 3rd June 2011 for the application of the Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, No 409/10 June 2011.

Jurisprudence

Constitutional Court Decision No 755/2014, published in the Official Gazette of Romania, Part 1, No 101/9 February 2015.
Constitutional Court Decision No 26/2012, published in the Official Gazette of Romania, Part 1, No 116/15 February 2012.
Constitutional Court Decision No 90/1 June 1999, published in the Official Gazette of Romania, Part 1, No 489/11 October 1999.
Constitutional Court Decision No 9/1994, published in the Official Gazette of Romania, Part 1, No 326/25 November 1994.

Abstract
The principle of non-retroactivity of the law in the Romanian civil code

The principle of non-retroactivity of the civil law has its fundament in ensuring the security of the civil circuit and in its compliance with the rights and legitimate interests of the subjects of law. After 1991, the Romanian legislator has chosen to constitutionalize the non-retroactivity of the law, stating a single exception, namely that of the criminal or administrative law more favourable. Therefore, the principle has acquired a mandatory feature, both for the legislator, for the law enforcement organs, as well as for other participants in the judicial circuit. In its turn, the Romanian Civil Code of 2011, by preserving the tradition of the Civil Code of 1864, expressly states the non-retroactivity of the civil law. Thus, the non-retroactivity is configured as a guarantee of the stability of the state of law, of the constitutionality, an essential guarantee of the constitutional rights and, especially, of the personal freedoms and safety.
Key words: Romanian Constitution, Romanian Civil Code, principle of non-retroactivity, legal certainty