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María Elena Lauroba Lacasa

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The Principle of Juridical Certainty and the Discontinuity of Law*

*Maria Elena Lauroba Lacasa***

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I. INTRODUCTION. THE JURIDICAL CERTAINTY AS AN EXPLICIT PRINCIPLE OF THE 1978 SPANISH CONSTITUTION

Juridical certainty is shaped as an explicit concept in the 1978 Spanish Constitution (SC). The preamble refers to it as the guiding principle of the entire legal order, a fundamental legal instrument for achieving the higher values of the system, and even an intermediate value that is to be followed in order to guarantee the consistency of the legal system.

Juridical certainty is a sum of certainty and legality, hierarchy and normative publicity, interdiction of the arbitrary, and absence of the

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** Professor, Secretary General, University of Barcelona.

retroactivity of the less favorable. The sum of these principles allows it to freely promote justice and equity.

II. CERTAINTY AS AN OBJECTIVE DEMAND OF KNOWING THE LEGALITY

Lawmakers must establish the time during which a law is in force, starting with the moment that the law comes into effect and the moment it loses its effects. Thus, this section analyses art. 2 CC, which sets the chronology of the norms and describes the problems that cause a bad technical regulation.

A. *The Publicity of the Law.*

Art. 2.1 CC: "A law comes into effect twenty days after its complete publication in the Official Gazette, if the norm itself does not stipulate otherwise."

B. *The End of the Effect of a Law.*

There are several mechanisms that cause a norm to lose its effect. These are: abolition, as the main technique; nullity, in direct relation with its being declared unconstitutional; loss of validity; and suspension.

C. *Succession of Laws. Retroactivity and the Transitory Law.*

The next question is how to set the succession of the norms, and exactly what law needs to be applied, in order to avoid conflicts between repealed and repealing laws. The answer is found in art. 2.3 CC: "Unless it stipulates differently, the norm will not be applied retroactively." The legislator can, however, give a law retroactive effect in certain circumstances, as long as it does not conflict with the limitations provided in the Constitution. Two concepts must be developed: 1) the operated retroactivity, distinguishing between maximum, medium and minimum retroactivity, and 2) the limitations provided by constitution. Art. 9.3 SC bans the retroactivity of the non-favorable penalty provisions. To better understand this, art. 9.3 must be corroborated with art. 25.1 of the Constitution which stipulates that "no one can be convicted for actions which, at the time they were committed, did not constitute crime, misdemeanor or administrative offense, according to the law in effect at that time." Art. 9.3 also bans the retroactivity of the provisions on restriction of individual rights (as referred to in Section 1a and 2a, Chapter 20 Title I, SC) and taxation.

The requirements of art. 9.3 SC are practically impossible to comply with, and give birth to major difficulties in developing a law that is not vague.

III. THE JURIDICAL CERTAINTY AS PREDICTABILITY OF JUDICIAL DECISIONS

What needs to be established next, is resolving whether jurisprudence is a source of law or not. Art. 1.6 SC sets that jurisprudence will complete the legal system as a complementary element and not as a basic one. Laws are to be created by a central legislature, and the court will apply the law to particular cases. Nevertheless, court decisions have played a very important role in certain fields, such as torts. Art. 117 of the constitution sets that judges are subjected only to the law, denying the mandatory effect of the jurisprudence. The fact that this concept applies to the decisions of inferior courts is unquestionable. A judge can however give different, yet valid, decisions. This has raised certain problems, since the prejudiced parties have invoked the violation of art. 14 SC regarding the right to equity. A new doctrine has been developed to relate the juridical certainty to the change of criteria. This doctrine is focused upon a court's ability to rule in accordance to its previous decisions. A different opinion of the court must not be arbitrary, but strongly motivated.

IV. CERTAINTY AND CHANGE: THE SOCIAL REALITY OF ART. 3.1 SC

The principle of juridical certainty must be understood as an instrument that consolidates the liberty of the legislator, and not as an obstacle in reforming the norms. Laws must be interpreted according to the social reality they are to be applied to. Preservation of the juridical certainty only imposes that the changes be based on those elements and not on the discretion of the legislator or the court.

V. FINAL APOSTILLE

We can conclude our exposition by saying that juridical certainty promotes justice and liberty. Since juridical certainty is an existential certainty, several jurists have qualified as unconstitutional the provisions that come in conflict with the values protected by the Spanish Constitution.

