

Investigating the Principle of Legal Security for families in Islamic Republic of Iran

Maryam Afshari¹

Abstract

Legal systems are not a set of fixed rules governing on relationships of individuals, these rules are dynamic and under continuous extension in a coherent framework. While being dynamic, these rules must induce consistency of legal relations by governing on relationships of individuals. In other words, people must know their own rights and they should be able to predict the results of their legal actions. Hence, the principle of Legal Security, as a dynamic principle that prevents legal system inaction, is proposed. This principle, as the driving force for extension and promotion of legal system, has an important role and it is one of the important goals of law. Obviously, the aim of law, besides achievement of justice is development of security. Legal Security may be described as a set of definitions, goals, solutions and tools based on which individuals, including families identify personal and social national and international rights, freedoms and duties, therefore they are able to proceed with their legal life with insight and understand their rights knowingly. Within the present article, the significance of the principle and its promising effects will be considered as factor influential in protecting the rights of Iranian families.

Keywords

Legal Security, Family, Stability, Certainty, Rule of Law

Please cite this article as: Afshari M. Investigating the Principle of Legal Security for families in Islamic Republic of Iran. Iran J Med Law 2017; 10(39): 87-100.

1. Assistant professor University of Islamic Azad, Tehran, Iran.

Email: m_afshari@sbu.ac.ir

Introduction

The concept of legal security was originally based on the “Rechtsstaat doctrine”, according to which public administration is subject to the law (the principle of legality).¹ Nowadays, the principle of Legal Security is widely used in law science and also in family law discourses; but it is recognized in legal texts and judicial procedure limitedly. It must be noted that the principle of Legal Security has a significant position in legal systems and it is main cornerstone of rule of law.² In other words, one of government requirements encapsulated in legal framework (rule of law) is citizens’ awareness concerning their legal rights and duties.³

Consequently, like other elements constituting rule of law, this principle is warranted in constitutions too. Another important point concerning this principle is its role in making the ground prepared for other elements of rule of law such as judicial security and individuals’ rights and freedoms support. In any legal system, as its first duty, the rights and freedoms of individuals must be supported, such that other aspects of legal system are defined based on this. It is obvious that this aspect of Legal Security is addressed in present article and Legal Security is discussed as the ground and condition of judicial security achievement. In this aspect, Legal Security is appeared in judicial proceedings and even previous to that and also as a guarantee for stability and transparency of legal system with achievement of individuals’ awareness concerning their rights. Legal Security meets this need and it sheds light on darkness in order that individuals and particularly the families know their rights. In this respect, it may be called Legal Security in its special sense. Judiciary security is a set of measures that are taken in order that the life, respect, freedom, privacy, mental security, property, job, and house of interested persons and their family members are protected in judicial, semi- judicial and disciplinary proceedings and also under interactional and parties’ decisions. Before discussing Legal Security and its

1. Paul Van Aerschot, *Activation Policies and the Protection of Individual Rights*, Routledge, 2016, p.10.

2. J. M Soulas De Russel, David, Raimbault, Pierre, “Nature etracines du principe de sécuritéJuridique: uneMise au Point”, *Revue Internationale de Droit comparé*, N.1, 2003, p.96.

3. *Ibid*, p.97.

important aspects, determination of two fundamental concepts, namely “right” and “security” that have a close relationship with Legal Security seems necessary.

Clarifying the Legal Concept of Security

Security is defined as: it is assurance by which individuals are assured and confidence that their life, assets, respect, job, house, residence and privacy are protected.¹ It is noted that such definition of security specifically does not refer to “Legal Security or judicial security” or an equal term. Such type of understanding of security is reflected in article 23 of Islamic Republic of Iran Constitution too.² It seems that above definition and other similar definitions of security phenomenon are close to the content of Legal Security concept and judicial security and cover it in terms of content.

Some scholar consider security as one of fundamental subjects of human rights together with individual and group freedoms³ and others categorize it under rubrics such as “freedom of individual performance” together with the right of living, housing freedom and immunity.⁴ Any way, it seems that the right to security is a concept beyond individual freedoms and even legal and judicial security; it is a concept that may be interpreted as human security; the security of which any individual in his individual and social life shall benefit.

Maryam Afshari

Distinguishing Between Human Security and Similar Concepts

As stated in previous part, security is considered mainly in the sense of personal security. Accordingly, principles such as “the principle of legality of punishment and crimes”, “the principle of acquaintance” and “the principle of no retroactivity” are regarded as positive results of personal security. Under this situation, two conditions may be cited for achievement

1. Hashemi, Seyed Mohammad, “human rights and fundamental freedoms”, Tehran, Mizan publications, 2005, p.36.

2. Article 23 of Islamic Republic of Iran Stutus: “respect, life, rights, housing and employment of individuals are protected from violation, unless in cases prescribed by law”.

3. Hashemi, Seyed Mohammad, op.cit., p.366.

4. Ghazi, Abolfazl, “necessities of the constitution”, Tehran, mizan pub., 1994. p.156-160.

of all above principles: investigation proceedings shall be regulated and the risks of willful detention shall be removed. So that, in this sense, personal security covers a part of the security of human the indicators of which are present in above mentioned principles. In this narrow definition, personal security shall be guaranteed from criminal law aspect and other aspects of human security are neglected. On the other hand, human security is distinguished from Legal Security. It must be noted that Legal Security and the concept of security (in its general sense have close relationship. This kinship is such that some of lawyers believe that Legal Security is one of cornerstones of personal security.

In fact, some of concepts and principles considered by us that are subsets of Legal Security principle are not related to personal security. Perhaps Legal Security has some relationships with personal security in some aspects, but obviously, it is beyond this domain in many aspects. However, this principle covers a set of sub-principles the common goal of all is developing confidence in law and judicial system in citizens.

Theoretically, this fundamental question is posed whether personal security could be analyzed in the form of individual freedoms. In general vision, both subjects are placed in the set of negative freedoms and the state is obliged to guarantee these rights for individuals. Fundamentally, it must be noted that the type of guarantees awarded to them are different: in individual freedoms, their existence is guaranteed by the state and the government is committed to prevent them from being breached and limited by oneself and others; while in personal security, non- breach of considered areas in this concept is guaranteed. In other words, personal security warranty is not a guarantee for their imposition, but it is a guarantee for their protection.¹

1. Human Security

Human Security is composed of two important components: freedom of fear and freedom of need; these two components extend human security in following aspects: economic, food, health, environmental, personal, political, social security and Legal Security is considered as one of titles of social security. Legal Security is one of important aspects of security provided by two ways; legislation and judicial security. In this part, by determining Legal

1. Ibid, p.150.

Security indicators in the field of family, reducing and increasing factors are explored and the current situation is identified based on obtained results and then by identifying the ideals, the ways by which the fact of security is recognized are presented in the light of general policies of Islamic Republic of Iran.¹

2. Legislation Security

For achievement of legislation security, there must be a unit authority, special provisions and stability of decisions and limited competences and no legal gap. By summing up the rules and presenting comprehensive family law while removing the conflicts by determining hierarchies of laws in the case of ambiguities, a law may be established that is considered superior by legislator and his will.

3. Judicial Security

For judicial security to be established, at first suitable judicial organization and then special court of justice shall be provided and specialized proceedings with special regulation and trained judges together with special bailiffs having moral competencies, required training, specialty and competencies and peaceful physical space suitable for families proportional with their needs shall be provided to help them feel comfort.

Given the importance of family entity, in family trials, there shall be several judges; in addition, there shall be present psychologist consultants, physicians and specialized social workers in suitable and enough number to provide the ground for fair orders and prevent the collapse of this most important social entity by referring the claim to arbitrators and inviting non-government specialized organizations to cooperate.

Furthermore, meeting the principle of proportionality of punishment and crime, the judges shall consider punishments and penalties that are legal and lead to remedy and betterment of family and those penalties that lead to complete collapse of families shall be prevented.

Determining the Domain of Legal Security

Legal Security due to its name is not related to the field of judicial order, but it covers legal order completely. In other words, the attribute “legal” does not mean that security is limited to just judicial issues. From other

1. Mac.Farlane SN, ..., op.cit, p.54.

aspect, Legal Security includes formal and material rules and even some of these rules possess both aspects, but in terms of nature, this principle entails two types of legal rules:

First, the rules that involve stability of legal situations and their continuity is concerned; second, legal rules and situations that entail transparency and precision of rules and judicial decisions.¹

Hence, the principle of Legal Security is depicted as one of fundamentals of rule of law evolution. This principle transforms the concept of rule of law from a formal system to a material system.²

1. Areas to Which Legal Security Principle is Applied

After recognizing theoretical fundamentals of Legal Security principle, concerning the areas are applied, on one hand there are individuals who are able to recourse to this principle and its related principles in order to protect their rights and their family's rights, and on the other hand, there are public institutions that must consider this principle whether from legislative point of view or from executive actions point of view.³

If Legal Security principle is considered as a fundamental subjective right, individuals may recourse to it not only against the government but also against other individuals. If this principle is considered as a constitutional object or a guiding principle, based on it the people may not be able to recourse to it concerning their disputes and benefit from it. It seems that both aspects toward enhancement of throughput of this principle are equally important.

The solution that may be presented in this regard is that: the principles related to this principle must be distinguished. Obviously, some of these aspects such as the principle of no retroactivity possess constitutional value and they shall be guaranteed and supported by the authority responsible for protecting the constitution. Some other principles such as the principle of contractual relations stability may be referenced in legal relations of individuals and it is obvious that this possibility of being cited leads to

1. Mathieu, Bertrand, "reflexions en juis de conclusion sur le principe de se'curite' juridique, Les Cahiers du conseil conctitutionnel, N.11, 2001, p.106.

2. Mathieu, Bertrand, "Constitution et se'curite' Juridique, France", Annuaire International de la Justice Constitutionnel, N.6, 1991, p.156-157.

3. Mathieu, Bertrand, "Constitution et se'curite' Juridique, ...", op. cit., p.175-176.

enhancement of Legal Security principle efficiency. Indeed, meeting Legal Security principle makes the legislator faced with big limitations in performing his obligations; this limitation is necessary given the other duty of legislator, namely protecting individuals' rights. In other words, guaranteeing Legal Security of individuals and particularly the families in one hand stabilizes their legal status and on the other hand protects social benefits.¹

2. Limitations of Exercising Legal Security Principle

Given the importance and status of this principle in all legal systems, the limitations existing in exercising this principle are regarded as exception. In other words, the goal is stabilizing legal status of individuals and authorities obliged to meet this principle shall present reasonable justifications for limiting it.²

The most important limitation of this principle is public interests. Meeting the principle of Legal Security guarantees public interests as well; because protecting citizens' legal status may lead to social stability. But it must be noted that when Legal Security principle is considered as an objective one, social interests may conflict with legal status stability of some persons.³ In such cases, in most of advanced legal systems, Legal Security breaching is considered exceptional and this breaching is interpreted in that certain limitation. Obviously, public interests shall not be extended to the extent that Legal Security of individuals is endangered. For example, in Switzerland, considering this exception, the principle of proportionality is regarded; it means that there must be proportion between public interests and breach of Legal Security.⁴

Legal Security in Iran

The right of having security was firstly proposed before constitutional movement. Principle 9 of the amendment to the constitution is historical

1. Ibid, p.178.

2. Van Lang, Aghathe, Gondouin, Genevre've', Inserguet-Brisset, Veronique, Dictionnaire de droit administrative, 2nd ed, Paris, A, Colin, 1999, p.223.

3. Chapus, Rene', Droit administrative ge'ne'ral, T.1, 15ed, paris, montchrestien, 2001, p.104-105.

4. Knapp, Bernard, "Constitution et se'curite' juridique, Suisse", Annuaire international de la justice Constitutionnel, N.6, 1991, p.267-268.

basis of article 22 of Islamic Republic of Iran constitution.¹ Given the definition proposed for human security in previous chapters we can claim that article 22 of Islamic Republic of Iran Constitution has guaranteed human security in an extensive concept. This principle entails various areas of benefiting from fundamental rights and freedoms. In article 22, privacy (including housing and employment), Legal Security (rights guarantee) and personal security (physical, financial and intellectual security) are guaranteed altogether. Hence, in article 22, different instances of security are stipulated in the form of such subset as human security. Given wide domain of human security in the framework of article 22, following areas may be enumerated:

- Personal Security: Investigating personal security to material and intellectual security of people is possible. In material security, the domain is a limited concept of human security that covers just his life and property protection and in intellectual or mental security, the word “respect” in article 22 implies the warranty granted for this aspect of personal security;

- Privacy: The second part of peoples’ life protected by article 22 is privacy. Two words “housing” and “employment” imply the warranty granted to this aspect of fundamental rights;

- Legal Security: As mentioned before, Legal Security is a part of human security in its wide sense. The word “rights” in article 22 implies that peoples’ rights is secured and protected from violation and this is exactly the end and objective of Legal Security. In this regard, acquired rights of people together with principles that guarantee legal status protection of people such as the principle of no retroactivity, the rules and principle of clarity of law is consisted of subgroup of Legal Security;

- Although Legal Security of people is explicitly protected in clause 14 of third article of Islamic Republic of Iran Constitution, it seems that by interpreting the term “rights” mentioned in article 22 a more exact and complementary basis may be found for it. Hence, this extensive interpretation provides the possibility of inferring various rights for people. These rights are confirmed in details in article 34 & 35. In addition, the

1. Ravandi, Morteza, “interpretation of Iraninan Constitution”, Tehran, Mobasheri pub., 1978, p.51.

principles of legitimacy of penalties and punishments (article 36) and acquittal (article 37) are guarantees for protection of citizens' Legal Security.

Given above statements, article 22 presents a wide platform as human security the various aspects of which are determined in logical order in next principles. Besides this principle, there are judicial rules besides legal order that are as a further guarantee for human security that shall be imposed and exercised in normal rules and administrative regulations and in fact they shall find executive aspect.¹

Another principle of Islamic Republic of Iran in which Legal Security principle in general sense is stipulated is clause 14 of article 3. This clause states that one of duties of Islamic Republic of Iran's government is providing complete rights of individuals (men and women) and developing fair Legal Security for all and equality of public in front of law.

Some practitioners regard this principle as one of elements of security concept; this tendency, particularly in French law is observable which in legal texts of France Legal Security principle is not explicitly mentioned. In this case, because in article 2 of French human and citizens' rights declaration (1789) the concept "security" is referred a statute basis may be found for Legal Security principle that according to them, it is a subset of security.²

But, if considered deeply it seems that there is a relationship between security and Legal Security. Indeed, some of concepts and principles considered by us that are the subset of Legal Security principle don't relate to security; therefore, the ideas and comments of those practitioners shall be accepted who find the statute basis of Legal Security principle in article 16 of citizens and human rights declaration.

Principles relating to Legal Security may be grouped in two categories: persons' Legal Security and law's Legal Security.³

1. Ansari, Bagher, "privacy law", Tehran, Samt pub., 2007, p.137-138.

2. Lunchaire, Francois, "La Se'curite' juridiquee droit constitutionnele Francais", les cashiers dur conseil constitutionnel, N.11, 2001, p.67-68.

3. Article 16 of French citizens and human rights states: any society in which protection of rights is not guaranteed and there is no clear separation and distinguish between the powers, no constitution exists at all.

Individual Legal Security

By persons' Legal Security we mean the principles that protect peoples' Legal Security against government power. Protecting individual freedoms and the principle of no retroactivity of laws are of this type. Obviously, for organizing their life affairs people need stability of their legal status and this makes their right for Legal Security inevitable. In Islamic Republic of Iran's Constitution, article 156 emphasizes on judiciary's power support of individual rights. Therefore, it can be claimed that judiciary power shall provide Legal Security of people in performing its duty concerning its support of individual rights and freedoms and it shall take required measures toward achievement of its due principles. In other words, article 156 of Iranian Constitution may be used as the third basis for protecting Legal Security in addition to clause 14 of article 3 and article 22.¹

The principle of no Retroactivity of Laws

This principle is based in the fact that the rights and duties of people shall be predictable and the principle of predictability of rules and regulations is a necessary principle for legal system. To make financial regulations retroactive may lead to violation of individuals' rights and particularly the families' rights who have used the advantages of past rules and they shall overlook them now.

Legal Security of law

In most of legal systems, Legal Security of law is of lower importance than individuals' Legal Security. The principle of legitimate certainty is related to Legal Security principle in that it allows people to predict the consequences of their acts legally. Due to predictability of legal consequences, a type of confidence in legal system is induced in people. In Iran, legislator and judicial authorities and also legal subjects have neglected this important principle and there is no trace of it in legal literature.²

1. Mathieu, Bertrand, "constitution et se'curite' juridique, France", op.cit., p.159-160.

2. Pizzorusso, Andre', Passagilla, Pierre, "constitution et se'curite' juridique, Italie", *Annuaire International de la justice constitutionnelle*, VI, 1991, p.215-217.

Another basis of Legal Security principle is the principle of respecting acquired rights for individuals. In Islamic Republic of Iran Constitution, principles 46& 47 relate to this issue. Principle 46 states that any individual is the owner of his/ her own legitimate business and related due rights induced by the business. Principle 47 states that personal ownership acquired legitimately shall be respected. Although this principle is related to property rights, but since one of the ways of developing ownership is contracting, so it covers the principle of respecting acquired rights as well. In the constitution, acquired rights induced from law are not directly referred. But by interpreting the general principle of Legal Security, namely article 22 we can infer it. However, judicial procedure has filled this gap in some extent. In this regard, particularly judicial procedure of administrative court of justice is considerable.

Another principle for achievement of Legal Security concept is clarity principle. For implementing Legal Security, presence of clarity in legal rules and relations is a necessity and extending it may lead to legal stability.¹

In Islamic Republic of Iran Constitution, no certain principle may be found confirming the principle of clarity of law, but article 167 is in obvious opposition to it. This principle states that the judge is obliged to try to find the order of any claim in codified law and if he does not find it, he shall issue the order by recourse to Islamic valid resources or valid judgments and he is not allowed to deny proceeding the claim with the excuse of silence or violation or brevity of conflict of laws and regulations.

Citing to resources other than statute by the judge for settlement of disputes has led to non-clarity of our legal system and so that the people Legal Security is endangered. Although guardians council supervises on the clarity of laws but imposition of such supervision is different and it benefits from other principles derived from Legal Security principle. In this way, since for commenting on Islamic Parliament approvals they shall be unambiguous, guardians' council obliges Islamic Parliament to approve regulations having less ambiguity. In a general vision, guardians' council has

1. Heers, Michel, "La Se'curite' juridique en droit administratif: vers une consécration du principe de confiance légitime", *Revue Française du Droit administratif*, 1995, p.963-965.

admitted the necessity of clear rules and this council supervises this issue. But analyzing the clarity of council's ideas in a coherent manner is difficult.

Conclusion

Today, the principle of Legal Security has become one of cornerstones of rule of law. This principle entails further principles by exercise of which the legal relations of individuals and also their relations with state entities are organized and gains more stability. This stability in legal relations leads to legitimate trust and assurance of individuals that includes certainty in the correctness of rules and also the performance of executive authorities. By explicit identification of this principle and its related sub-principles in Islamic Republic of Iran's Constitution it is inferred that guardians' council as the authority responsible for protecting the constitution shall attempt to give more support for mentioned principles. Meanwhile, the barriers against achievement of Legal Security such as article 167 of the constitution shall be amended. Family as the main social entity is the foundation of communities and addressing the stability and security of this entity and guiding it toward its real stand is achieved with Legal Security that has a considerable position in legal systems and it is main cornerstone of rule of law.

The principle of Legal Security is one of definite principles of public law that is referenced in all legal systems. This principle is rooted back to the characteristics of any legal system that today they are integral parts of those systems. Stability of legal system, and guarantee permanent support of peoples' rights, Certainty of rules contained in that system and producing Confidence to legal system are some of important characteristics mentioned above. In fact, on one hand, the principle of Legal Security is considered as one of important characteristics of rule of law and its guarantee is the first objective of legal systems and on the other hand many of legal institutions are justified by the principle of Legal Security.

The necessity to pay attention to this principle gains importance when we remember that stability of legal system that inevitably would lead to stability of legal relations has a deep impact on individuals' security, particularly the families.

References

- Ansari B. Privacy law. Tehran: Samt, 2007.
- Chapus R. Droit administrative général. 15th ed. Paris: Montchrestien, 2001.
- Fromont M. Le Principe de sécuritéJuridique. ActualitéJuridique de DroitAdministratif, N Spécial, 20 Juin, 1996.
- Ghazi A. Necessities of the constitution. Tehran: Mizan, 1994.
- Hashemi SM. Human rights and fundamental freedoms. Tehran: Mizan, 2005.
- Heers M. La Sécuritéjuridiqueen droit administrative: versuneconsécration du Principe de confrancelegitime. Revue Francaise du Droitadministratif, 1995.
- J.M Soulas De Russel D, Raimbault P. Nature etracines du principe de sécuritéJuridique: uneMise au Point. Revue Internationale de Droit comparé 2003; N.1.
- Katouzian N. Fundamentals of public law. 2nd ed. Tehran: Dadgostar, 2004.
- Knapp B. Constitution etse'curitéjuridique, Suisse. Annuaire international de la justice Constitutionnelle 1991; N.6.
- Lunchaire F. La Sécuritéjuridiqueen droitconstitutionneleFrancais. Les cashiers durconseilconstitutionnel 2001; N.11.
- Mac Farlane SN, Khong YF. Human Security and the UN: A critical history, Bloomington. Indiana University Press, 2006.
- Mathieu B. Constitution et sécuritéJuridique, France. Annuaire International de la Justice Constitutionnelle 1991; N.6.
- Mathieu B. Reflextionsenjuis de conclusion sur le principe de sécuritéjuridique. Les Cahiers du conseilconctitutionnel 2001; N.11.
- Mc.Sweeney B. Security, identity and Interests: Asociology of international relations. Cambridge University press, 1999.
- Van Aerschot P. Activation Policies and the Protection of Individual Rights. Routledge, 2016.

- Pizzorusso A, Passagilla P. Constitution et sécurité juridique, Italie. *Annuaire International de la justice constitutionnelle* 1991; N.6.
- Rasekh M. *Right and discretion*. 3rd ed. Tehran: Tarhe Nou, 2008.
- Ravandi M. *Interpretation of Iraninan Constitution*. Tehran: Mobasheri, 1978.
- Van Lang A. Gondouin, Genevrévé, Inserguet-Brisset, Veronique, *Dictionnaire de droit administrative*. 2nd ed. Paris: A Colin, 1999.
- Zimmer W. *Constitution et sécurité Juridique*, Allenmajne. *Annuaie International de la Justice Constitutionnelle* 1991; N.6.