

## LEGAL CERTAINTY, FUNDAMENTAL RIGHTS, AND THE PROHIBITION OF SOCIAL BACKSLIDING

### SEGURANÇA JURÍDICA, DIREITOS FUNDAMENTAIS E A VEDAÇÃO DO RETROCESSO SOCIAL

### SEGURIDAD JURÍDICA, DERECHOS FUNDAMENTALES Y LA PROHIBICIÓN DEL RETROCESO SOCIAL



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#### ABSTRACT

This article examines legal certainty as a structural element of the Democratic Rule of Law and analyzes its relationship with the prohibition of social backsliding under the Brazilian Constitution of 1988. It is based on the premise that legal certainty is not limited to the formal stability of legal rules, but also includes the protection of legitimate expectations, the preservation of consolidated legal situations, and the safeguarding of levels of implementation already achieved by fundamental rights, especially social rights. The study investigates the constitutional foundations of legal certainty, its connection with human dignity, and its role in restraining state measures that arbitrarily or disproportionately weaken social gains already secured. It argues that the prohibition of social backsliding, although it does not impose absolute immutability on the legislature, operates as a standard for reviewing state choices, requiring adequate constitutional justification for restrictive changes in the social sphere. The article concludes that, in a constitutional order committed to the effectiveness of fundamental rights, legal certainty and the prohibition of backsliding work in a complementary manner, serving as instruments for the protection of trust, normative stability, and human dignity.

**Keywords:** Legal Certainty. Fundamental Rights. Prohibition of Social Backsliding. Human Dignity. Democratic Rule of Law.

#### RESUMO

O artigo examina a segurança jurídica como elemento estruturante do Estado Democrático de Direito e analisa sua relação com a vedação do retrocesso social no âmbito da Constituição brasileira de 1988. Parte-se da premissa de que a segurança jurídica não se limita à estabilidade formal das normas, mas também abrange a proteção da confiança, a preservação de situações jurídicas consolidadas e a defesa de níveis de concretização já alcançados pelos direitos fundamentais, especialmente os direitos sociais. A pesquisa investiga os fundamentos constitucionais da segurança jurídica, sua vinculação com a dignidade da pessoa humana e sua função de contenção de medidas estatais que, de maneira arbitrária ou desproporcional, enfraqueçam conquistas sociais já implementadas.

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Sustenta-se que a proibição de retrocesso social, embora não imponha imutabilidade absoluta ao legislador, atua como parâmetro de controle das escolhas estatais, exigindo justificção constitucional adequada para alterações restritivas em matéria social. Conclui-se que, em uma ordem constitucional comprometida com a efetividade dos direitos fundamentais, a segurança jurídica e a vedação de retrocesso operam de forma complementar, funcionando como instrumentos de tutela da confiança, da estabilidade normativa e da proteção da dignidade humana.

**Palavras-chave:** Segurança Jurídica. Direitos Fundamentais. Vedação do Retrocesso Social. Dignidade da Pessoa Humana. Estado Democrático de Direito.

## RESUMEN

El artículo examina la seguridad jurídica como elemento estructurante del Estado Democrático de Derecho y analiza su relación con la prohibición del retroceso social en el ámbito de la Constitución brasileña de 1988. Se parte de la premisa de que la seguridad jurídica no se limita a la estabilidad formal de las normas, sino que también comprende la protección de la confianza, la preservación de situaciones jurídicas consolidadas y la defensa de los niveles de concretización ya alcanzados por los derechos fundamentales, especialmente los derechos sociales. La investigación estudia los fundamentos constitucionales de la seguridad jurídica, su vínculo con la dignidad de la persona humana y su función de contención frente a medidas estatales que, de manera arbitraria o desproporcionada, debiliten conquistas sociales ya implementadas. Se sostiene que la prohibición del retroceso social, aunque no imponga una inmutabilidad absoluta al legislador, actúa como parámetro de control de las decisiones estatales, exigiendo una justificación constitucional adecuada para cambios restrictivos en materia social. Se concluye que, en un orden constitucional comprometido con la efectividad de los derechos fundamentales, la seguridad jurídica y la prohibición del retroceso operan de forma complementaria, funcionando como instrumentos de tutela de la confianza, de la estabilidad normativa y de la protección de la dignidad humana.

**Palabras clave:** Seguridad Jurídica. Derechos Fundamentales. Prohibición del Retroceso Social. Dignidad de la Persona Humana. Estado Democrático de Derecho.

## 1 INTRODUCTION

Life in society is always changing, and the Law follows this movement. Laws, institutions and legal interpretation do not remain frozen in time. Even so, people need a minimum of stability to live with tranquility. No one can organize their own life safely when everything changes all the time, without any predictability. Therefore, security is a basic value in any state that intends to be taken seriously as a rule of law. This concern even appears in important international human rights documents and also in the Brazilian Constitution of 1988, which protects security in general and, in several points, also ensures the so-called legal certainty.

When it comes to legal certainty, it is not a simple idea. The theme is broad and involves several theoretical and practical difficulties. Just think, for example, of the discussions about acquired rights, the limits of legislative changes, and the degree of protection that the Constitution offers to situations that have already been consolidated. These debates show that the matter is complex and remains current, precisely because it has direct consequences on people's lives and on the functioning of the legal system itself.

In addition, studying legal certainty does not only mean defining what it is. It is also necessary to analyze whether it really works in practice, that is, whether it produces concrete effects and whether it can protect individuals in the face of changes promoted by the government. As the subject is very broad, it is necessary to make a cut. Without this, the study would run the risk of being scattered and superficial.

Within this cut, the analysis focuses on a specific point: protection against measures that remove or diminish rights and legal positions already recognized. In other words, the focus is on the idea that legal certainty also serves to prevent setbacks. This is especially important in the field of fundamental rights and, even more strongly, in the field of social rights, because these rights often depend on the actions of the legislator and public policies to get off the ground and become a reality. It is precisely in this field that the problems appear with more intensity.

This theme reveals an important link between legal certainty and social security. After all, protecting social rights linked to a dignified life also requires some degree of legal stability. For this reason, examining the prohibition of social retrogression presupposes understanding, even if in an initial way, the meaning of legal certainty and some of the ways in which the prohibition of retrogression appears in Brazilian constitutional law. The proposal, therefore, is to develop the theme little by little, delimiting its contours throughout the exhibition.

## 2 LEGAL CERTAINTY IN THE DEMOCRATIC RULE OF LAW

When talking about the right to security, legal texts do not always explain precisely what this means. In many cases, the word "security" appears broadly, without clearly indicating all its limits and meanings. Therefore, it can be understood as a comprehensive idea, within which various forms of protection fit, such as legal certainty, social security, public security, and personal security. In other words, it is a general expression, which has different developments according to the context.

In addition to this broader reference to security, some constitutions and international documents deal with more specific aspects of the subject. In certain European constitutional texts, for example, security is linked to personal freedom, employment protection and social security. At the international level, it is common to mention the safety of the person, especially in norms for the protection of human rights. Legal certainty, on the other hand, often does not appear with this name expressly, but is manifested through guarantees against retroactive measures and by rules that prevent punishments without a previous law that provides for them. Thus, even when the term "legal certainty" does not appear directly, part of its content can be perceived in other guarantees recognized by law.

In any case, there is now a well-established understanding: there is no true rule of law without legal certainty. This is because it is not enough to have government through laws. It is also necessary that these laws offer a minimum of stability, predictability and confidence to people. Without this, the law itself can become an instrument of abuse. For this reason, legal certainty has come to be seen as a requirement of the Rule of Law. It is not a secondary value, but a structural element of the constitutional order. At the same time, it can be understood both as a fundamental right of the person and as a principle that organizes the functioning of the legal system.

In the Brazilian case, the 1988 Constitution gives great importance to security. It already appears in the Preamble and was also placed among the inviolable rights of Article 5, alongside life, liberty, equality and property. Although the Constitution does not directly use the expression "right to legal certainty" as a general autonomous rule, it protects this value in several provisions. This occurs, for example, when it states that no one is obliged to do or refrain from doing something except by virtue of law; when it safeguards the acquired right, *res judicata* and the perfect legal act; when it requires a previous law to define crimes and penalties; when it prohibits the retroactivity of the harmful criminal law; and when it ensures guarantees such as due process, adversarial and ample defense. All this shows that legal certainty is spread throughout the Constitution in different norms.

These elements make it clear that legal certainty occupies a prominent position in the Brazilian constitutional order. It does not appear only in isolated rules, but is part of the very idea of the rule of law adopted by the Constitution. Therefore, its protection is not limited to what is literally written on some devices. The constitutional system also allows for the recognition of other manifestations of legal certainty, including those that arise from the interpretation of constitutional principles. Among these manifestations, two deserve special attention: the protection of trust and the prohibition of retrogression. Both help to better understand how the law seeks to preserve a certain stability in legal relations and prevent the government from arbitrarily undoing situations that have already been consolidated.

It is also important to realize that security is not limited to legal certainty. The Constitution also protects a broader sense of security, which involves the defense of the person against aggressions against his or her rights, including through duties of protection imposed on the State. This gives rise to a direct link between legal certainty, personal security and social security. In the case of social security, this relationship is even more evident, because the protection of social rights depends not only on their provision in law, but also on sufficient stability to prevent their undue erosion. For this reason, legal certainty cannot be seen as something purely technical or abstract. It is connected with people's concrete lives and with the preservation of minimum conditions for a dignified existence.

Finally, recognizing the importance of legal certainty does not mean defending an immovable right, incapable of changing. Law follows the transformations of society, and changes can be legitimate and even necessary. What cannot be admitted is that these changes completely eliminate people's trust in institutions or make the performance of the public power excessively unpredictable. Therefore, legal certainty is not synonymous with absolute immutability. It requires, in fact, a balance: the legal system must allow for changes, but without arbitrarily disrupting the stability indispensable to life in society.

### **3 PRINCIPLE OF PROHIBITION OF RETROGRESSION**

Legal certainty meets a very basic human need: the need to live with some stability. People need to trust that the rules will not change abruptly at all times and that their legal situations will not be undone without adequate justification. This stability is important because it allows you to organize your life, make plans, and pursue goals with a minimum of tranquility. Therefore, legal certainty is directly linked to the dignity of the human person.

The dignity of the human person does not depend only on the abstract recognition of rights. It also requires a minimally stable legal environment, in which the individual can trust the institutions and guarantees that have been guaranteed to him. When there is excessive

instability, the person no longer knows with certainty what rights he has and to what extent he can count on the protection of the State. In this situation, their autonomy and their own condition as subjects of rights are weakened.

This means that it is not enough to say that someone has fundamental rights. These rights need to be protected in a serious manner, including against arbitrary changes. If the legal system could freely withdraw positions already recognized, the person would end up being at the mercy of the state's will. Instead of being treated as an end in itself, it would be seen as a simple instrument of external decisions. That is why legal certainty functions as a condition for the effective protection of dignity and fundamental rights themselves.

Within this context, the idea of protecting trust gains prominence. In simple terms, protecting trust means recognizing that the citizen must be able to believe, to a certain extent, in the continuity and seriousness of the legal order. It is not a matter of preventing any and all changes, because the Law needs to accompany society. The point is different: state changes cannot frustrate, in an unjustified way, legitimate expectations created by the legal system itself. Legal certainty, therefore, always involves some degree of protection of trust.

This protection has an objective and a subjective dimension. In the objective dimension, legal certainty requires a certain continuity, coherence, clarity and stability of the Law itself. In the subjective dimension, it protects people's confidence in relation to the legal consequences of their acts and the minimum permanence of the situations that the legal system has already recognized. In other words, not only the system in the abstract is protected, but also the concrete position of the individual within it.

It is in this environment that well-known institutes appear, such as the acquired right, the perfect legal act and *res judicata*. All of them help to preserve consolidated situations and express the concern of the Law not to undo, in a frivolous way, what has already been legitimately constituted. Although there is controversy about the exact scope of this protection and even about the concept of acquired right, the general idea is clear: a rule of law cannot treat with indifference the legal positions that have already been stabilized.

The protection of trust is also important when examining laws or acts of the State with retroactive effect. As a rule, retroactive measures arouse suspicion precisely because they can surprise the citizen and compromise the stability on which he has organized his life. Therefore, the prohibition on unfavorable retroactivity is directly related to the trust that the person places in the legal system. In some situations, this protection reaches not only fully consolidated rights, but also legitimate expectations, especially when the change in legal regime requires reasonable transition rules.

Another important point is the link between protection of trust and good faith. Good faith, in a broad sense, imposes loyalty, coherence and respect for legitimately created expectations. When the public power itself adopts behaviors that give rise to a certain expectation in the citizen, he cannot then act as if he had promised or signaled nothing. This notion reinforces the idea that the State must also be consistent with its own acts. Hence the proximity between good faith, protection of trust and prohibition of retrogression.

The prohibition of retrogression, in this scenario, can be understood as a barrier against the unjustified withdrawal of advances already made, especially in the field of fundamental rights. The logic is simple: if a certain level of protection has already been achieved, it does not seem compatible with the Constitution to allow its arbitrary elimination, especially when it compromises the dignity of the human person. This concern becomes even stronger in the area of social rights, because the realization of these rights often depends on laws, public policies and continued state benefits.

At the same time, it is important not to turn legal certainty into an idea that is too rigid. Security does not mean absolute immobility. The Law can and should change when necessary. Legislative reforms, institutional adjustments, and new public choices are part of constitutional life. The problem arises when these changes are made without criteria, without adequate transition, and with contempt for the trust legitimately placed by people in the legal system. The challenge, therefore, lies in balancing change and stability.

In summary, legal certainty is not only a technical requirement of the legal system. It protects human dignity, strengthens fundamental rights and prevents the citizen from being entirely exposed to the oscillation of the state's will. Therefore, when we talk about the prohibition of retrogression, we are also talking about respect for trust, good faith and the minimum stability indispensable for freedom and rights to have real value in concrete life.

#### **4 FINAL CONSIDERATIONS**

At the end of this analysis, it is clear that the theme is still far from being exhausted. There are several points that could be deepened, because the discussion on legal certainty and prohibition of retrogression is broad and full of practical consequences. Even so, it is already possible to draw an important conclusion: there is a very strong link between the protection of legal certainty and the need to prevent the government from eliminating or reducing, in an excessive way, levels of social protection that had already been achieved. When this happens disproportionately or with offense to the dignity of the human person, a serious constitutional problem arises.

This discussion gains even more importance when observing the Brazilian reality. In a country marked by deep inequalities and significant levels of social exclusion, any measure that weakens social rights that are already precariously guaranteed can further aggravate an already problematic scenario. Therefore, reflecting carefully on the prohibition of retrogression is not a merely theoretical exercise. This is an urgent debate, with a direct impact on the concrete lives of people, especially the most vulnerable.

At the same time, the issue requires balance. Legal certainty is a very important constitutional value, but it cannot be seen in isolation or as an absolute obstacle to any and all changes. The State also needs to adapt its policies and norms when this is really necessary to meet the interest of the collectivity. The delicate point lies precisely in finding the correct measure between two poles: on the one hand, the preservation of stability and trust; on the other, the possibility of promoting legitimate changes that respond to social needs. The change, when constitutionally justified, can also serve the very idea of security.

In this scenario, one of the greatest challenges of contemporary constitutional law is to establish an adequate hierarchy between these values in each concrete case. It is not a matter of blindly choosing between keeping everything as it is or allowing any reform. What is required is a careful judgment, which considers the dignity of the human person, the protection of fundamental rights and the real demands of life in society. Changes can be admitted, but not to the point of destroying essential achievements or emptying the minimum protection due to people.

Therefore, the idea of prohibiting retrogression, especially in the field of social rights, can function as a relevant legal tool to preserve a State model that does not abandon its basic responsibilities. Instead of accepting a progressive reduction of social protection in the name of excessively minimalist projects, constitutional law can serve as a brake against dismantling incompatible with the Constitution. In this sense, the prohibition of retrogression helps to affirm the importance of a State committed to the promotion of human dignity and the maintenance of minimum conditions of social justice.

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