Evolution of the quality of regulation concept in the context of ensuring legal certainty

Constantin ELENA

ABSTRACT

Given the amount of legislation, regulatory quality requirements should be rigorous in the sense that law quality standards should come to ensure the accuracy of laws, and thus balance and efficiency.

The research dedicated to the evolution of the quality of regulation introduces important principles of law as legal certainty, quality of norms but also discusses aspects related to soft law and non-binding legal instruments.

KEYWORDS: *law, principles, quality of regulation, legal certainty, soft law*

1. Introduction

Human society has received many definitions throughout history, trying to be explain as accurately as possible, as close as possible to reality. It has been shown that "[...] is a starting point but also a return for all social, political and moral constructions. Human societies are characterized as primitive, underdeveloped, developed, they are the cradle of civilizations of religions, cultures, hopes, but also of wars, failures and disappointments"[1)].

The system of values, economic factors and traditions have generated the appearance of rules that everyone must respect for a good cohabitation and prosperity. In the doctrine, it was stated[2)] that the legal order was born spontaneously, in the incipient phases of society, being a necessity indissoluble to the existence and evolution. In another opinion, the idea that "[...] man, precisely because he is a man, has rights inherent in his nature, and that his disobedience would prejudice that nature". There are rights before any legal[3)] consecration "pointed to the natural law fire".

1) Muraru, I. and Tănăsescu, E. S. 2008. *Drept constitutional și instituții politice* – 13th Edition, Vol.1, Bucharest, Romania: C.H. Beck Publishing House, pp.1-2.

2) Luca, Ion. 1922. *Raționalismul în Drept*, Bucharest, Romania: Cartea Românească S.A. Publishing House, p. 5.

3) Moroianu Zlătescu, Irina. 2007. *Drepturile omului – un sistem în evoluție*, Bucharest, Romania: I.R.D.O. Publishing.

For the law to be respected by its recipients, it needs to be made public. Also, stability and legal certainty are important criteria for the law to be respected. We cannot talk about compliance if it is not clear enough, predictable and accessible.

The alert of society's evolution determines a broader approach and in-depth reflection of the principle of legal certainty, given the quantitative increase of the legislation, generated by the evolution of society and other factors.

In 1960, the concept of legal certainty began to grow at an international level, with the gradual increase in the degree of complexity of national[4)] legal systems. The importance of legal certainty, derived from the rule of law, and the link with the rule of law are evident in the context of the democratic state[5)].

2. The principle of legal certainty

The Constitutional Court of Romania and the European Court of Human Rights have had a defining role in taking over this concept in Romanian law, with the CCR showing[6)] that "As regards the principle of stability / security of legal relations ... the European Court of Human Rights has ruled that "it must be interpreted in the light of the preamble to the Convention, which states the pre-eminence of law as a joint patrimony of the Contracting States. One of the fundamental elements of the pre-eminence of law is the principle of legal certainty, which means, inter alia, that a final solution to any dispute must not be resolved".

In several cases[7)], the European Court of Human Rights has held that a fundamental element of the rule of law is the principle of legal certainty[8)]. Desiring to clarify the scope of the notion of "right" and the inseparable link between legal certainty and the quality of regulation, the ECHR has stated[9)] that "the concept of" law "used in Article 7 corresponds to that of" law "in other articles of the Convention; it encompasses the right of both legal and jurisprudential origin and implies some qualitative conditions, including accessibility and predictability".

---

4) Safta, Marieta. *Valorificarea normelor de tehnică legislative în controlul de constituționalitate*, in *Consiliul legislativ – Buletinul informativ*, no. 2/2016, Bucharest, Romania: Monitorul Oficial Publishing House, p. 3.

5) Bălan, Emil. *Prolegomene la o dezbatere privind codificarea administrativă*, in the Volume: *Codificarea administrativă. Abordări doctrinare și cerințe practice*, Bucharest, Romania: Wolters Kluwer Publishing House, 2018, p. 27: "*The desideratum of the building of a rule of law and democratic state requires the protection of citizens from the excessive exercise of power, which is done in violation of the principle of security of legal relations, violation committed by promoting and preserving in the legal system unclear, incomplete or contradictory legal norms".*

6) CCR – Judgement no. 686/2014, M.Of. nr. 68/27 January 2015.

7) ECHR – Judgement from 6th of June 2005 in Androne v. Romania, par.44; Judgement from 7th October 2009 in Stanca Popescu v. Romania, par. 99.

8) ECHR – Judgement from 28th of October 1999 in Brumărescu v. Romania, par.61; Judgement from 22nd of March 2005 in Roşca v. Moldova, par. 24.

9) ECHR – Judgement from 24th of May 2007 in Dragotoniu and Militaru-Pidhorni v. Romania.

Also, in the case of Ahmed v. Romania, the ECHR stated that "Since the word "law" designates national law, the reference to it refers, as an example to all the provisions of the Convention, not only to the existence of a basis in domestic law but also with the quality of the law: it requires its accessibility and predictability, as well as certain protection against arbitrary violations by the public power of the rights guaranteed by the Convention"[10)].

The Constitutional Court of Romania has stated that "[...] the principle of the stability of legal relations, although not explicitly enshrined in the Constitution of Romania, is deduced both from the provisions of art. 1 par. (3), according to which Romania is a state of law, democratic and social, and the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its case law"[11)].

3. The Quality of regulation

The European Court of Human Rights[12)] and the Constitutional Court of Romania have pointed out that accessibility, clarity, predictability and consistency are the main regulatory quality standards, defining them as follows:

• *The accessibility* of the law concerns the public disclosure thereof, which is achieved through the publication of normative acts. Nobody can plead ignorance of the law. In the same vein, the European Court of Human Rights has held that the law must indeed be accessible to the individual and foreseeable in terms of its effects. An example of the notion of "accessibility" is the ECHR judgment, paragraph 32 of the Ahmed Case v. Romania case, which states that "As regards accessibility, the said law [...] was published in the Official Gazette of Romania, Part I. Therefore, this text respects the accessibility criterion".

• *Predictability* requires that a text be sufficiently precise and clear to be applied; to specify with sufficient clarity the scope and the means of exercising the discretion, taking into account the legal aim pursued, in order to provide the person with adequate protection against arbitrariness[13)]. In the same vein, the European Court of Human Rights ruled that the law must indeed be accessible to the individual and foreseeable in its effects. The CEDO recalls that "[...] the significance of the notion of predictability depends to a large extent on the context of the text and the number and quality of its recipients [...]"[14)]. The foreseeability of the law does not preclude

---

10) ECHR – Judgement from 13th of July 2010 in Ahmed v. Romania, par. 52.

11) CCR – Judgement no. 404/2008, M.Of. no. 347/ 6th of May 2008 and Judgement no. 686/2014, M. Of. no. 68/27th of January 2015.

12) ECHR – Judgement from 1st of December 2005 in Păduraru v. Romania, par.92; Judgement from 6th of December 2007 in Beian v. Romania, par. 33.

13) ECHR – Judgement from 4th of May 2000 in Rotaru v. României, par. 55.

14) ECHR – Judgement from 28th of March 1990 in Groppera Radio AG and others v. Switzerland, par. 68.

the person concerned from having recourse to good advice in order to assess, at a reasonable level in the circumstances of the case, the consequences that might result from a particular action[15].

The ECHR has also already found that "[...] even because of the principle of lawfulness, their content cannot be absolutely accurate. One of the regulatory techniques consists in resorting to general categories rather than exhaustive lists. Many laws also use the effectiveness of more or less vague formulas to avoid excessive rigidity and adapt to changing circumstances. The interpretation and application of such texts depends on practice"[16].

Another example of the predictability of the law is Art.VII of O.U.G. no.92 / 2018 for the amendment and completion of some normative acts in the field of justice[17], the predictability condition is not respected because it is decided that in the case of a right won by a competition that implied, among other things, at the moment when the candidates participated, they meet a certain number of years in service, and now, through this GEO it is stipulated that on the date of its entry into force, persons who do not fulfil the new condition of seniority may no longer carry out specific activities of prosecution. The text does not change the right of those persons, but the effects deriving from this right, in this case the prosecutors who do not meet the new condition of seniority in activity can no longer carry out criminal prosecution. Similarly, the Constitutional Court of the Czech Republic has stated that the principle of protecting citizens' confidence in the law, as well as the related principle prohibiting the retroactive effects of legal norms, are among the basic principles defining the rule of law.

• *Clarity* requires the text to be coherent, non-compliant, non-contradictory[18], intelligible, fluent, etc., otherwise ambiguity or "[...] partial regulation may leave" loudspeakers "of interpretation [...]"[19]. In Rotaru v. Romania, paragraph 55, the European Court of Human Rights stated that "... the law must therefore define

---

15) ECHR – Judgement from 13th of July 1995 in Tolstoy Miloslavsky v. UK, par. 37.

16) ECHR – Judgement from 24th of May 2007 in Dragotoniu and Militaru-Pidhorni v. Romania, par. 35.

17) G.E.O. no. 92/2018 for amending and completing some normative acts in the field of justice, Art. VII: *"Prosecutors who, at the date of entry into force of this Emergency Ordinance, are working in the Prosecutor's Office attached to the High Court of Cassation and Justice, the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate, within the other prosecutor's offices, remain in office only if they meet the conditions provided by the Law no. 303/2004 on the status of judges and prosecutors, republished, with subsequent amendments and completions, and Law no. 304/2004 on judicial organization, republished, with subsequent amendments and completions".*

18) CCR – Judgement no. 26/2012, M.Of. no. 116/15.02.2012: *"The existence of contradictory legislative solutions and the annulment of some provisions of the law through other provisions contained in the same normative act leads to violation of the principle of security of legal relations due to the lack of clarity and predictability of the norm".*

19) Vasilescu, Benonica. *Scurte considerații privind Codul administrativ*, in the Volume: *Codificarea administrativă. Abordări doctrinare și cerințe practice*, Bucharest, Romania: Wolters Kluwer Publishing House, 2018, p. 89.

sufficiently clearly the limits of the margin of appreciation given to the executive but also the manner of exercise, having regard to the legitimate aim of the measure in question in order to provide the person with adequate protection against arbitrariness"[20]. Considering the notions of coherence and accuracy, I do not think they are covered by the notion of clarity because a text can be clear without being coherent precise. The right words, the right phrases, and the balance between precision and comprehensibility are rigor that any text should do to be clear, understandable.

• *Law no.24 / 2000 the legislative technique for drafting normative acts* – besides the quality standards established by the European Court of Human Rights, the Romanian Constitutional Court added the observance of the Law no.24 / 2000 the legislative technique for drafting normative acts as a condition of the quality of the law, arguing that "Although the normative norms have no constitutional value, the Court found that by regulating them there were imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of legislation, as well as the appropriate legal content and form for each normative act. Thus, compliance with these rules is conducive to securing legislation that respects the principle of legal certainty, with the necessary clarity and foreseeability". Article 3 of Law no. 24/2000, Chapter I – General Provisions, expressly lays down the obligation to comply with the rules of legislative technique and lists the authorities to which that obligation is subject[21].

By Decision no.22 / 2016, the Constitutional Court stated that compliance with the provisions of Law no.24 / 2000 the legislative technique for drafting normative acts constitutes a genuine criterion of constitutionality through the application of Article 1 (5) of the Constitution. "[...] In principle, any normative act must meet certain qualitative conditions, including foreseeability, which means that it must be sufficiently clear and precise to be enforceable". Therefore, "the non-observance of the normative norms determines the occurrence of situations of incoherence and instability, contrary to the principle of security of juridical relations in its component regarding the clarity and predictability of the law"[22], therefore, "observance of the

---

[20] ECHR – Judgement from 2nd of August 1984 in Malone v. UK, par. 56.

[21] Law no. 24/2000 Law no. 24/2000 on the normative technical norms for the drafting of normative acts, Art.3: "(1) The legislative technique norms are mandatory for the elaboration of draft laws by the Government and legislative proposals belonging to deputies, senators or citizens, in the exercise of the right to legislative initiative, in the elaboration and adoption of ordinances and decisions of the Government, as well as in the elaboration and adoption of normative acts of the other authorities with such attributions. (2) The legislative technique norms also apply accordingly to the elaboration and adoption of the draft orders, instructions and other normative acts issued by the heads of central public administration bodies, as well as to the elaboration and adoption of the normative acts issued by the administration authorities local public".

[22] CCR – Judgement no. 26/2012, M.Of. no. 116/15.02.2012.

provisions of Law no. 24/2000 regarding the normative legal norms for the drafting of normative acts constitutes a veritable constitutional criterion in terms of the application of art. 1 par. (5) of the Constitution"[23].

Subsequently, in the same sense, the Constitutional Court of Romania has stated[24] that only the intrinsic aspects of the normative act affecting the clarity, precision, predictability and accessibility of the legal norm are related to the quality requirements of the law, and not to the intrinsic aspects of the norm (wrong name the absence of standardized drafting formulas to highlight the derogation provided by the legislator, the deletion of the significance of the basic normative act due to its multiple changes and the lack of correspondence between the explanatory statement accompanying the legislative proposal at the start of the legislative process and the final legislative content of the law adopted by Parliament, etc.). "[...] Art. 30 par. (2) of the Law no. 24/2000, because the explanatory statement accompanying the original form of the law no longer corresponds to the final form of the law, and the establishment of exceptions in the law examined does not correspond to the imperative norms of art. 63 of Law no. 24/2000. Examining these criticisms, the Court notes that they refer, in their content, to the extrinsic nature of the law under consideration, since they have aspects outside its intrinsic normative content". Thus, it concluded that [...] cannot, by itself, a real constitutional substance, because they cannot directly or indirectly affect any fundamental right, liberty or principle [....].

4. Soft Law – non-binding legal instruments

Software laws can be defined as normative provisions contained in non-binding texts. These cover those weak provisions of international regulations that do not imply obligations. The soft law emerged at a time when positivist theories had to confront the regulation of new legal issues previously belonging to the local reserve Non-mandatory law triggered doctrinal debates about the difference between it and the law deeply rooted in positions adopted based on the sources of international law or the law-making process[25].

Non-binding law also has different functions covering the initiation of law and the interpretation and adaptation of mandatory legislation and is in the delegation of functions conferred on international bodies charged with the development of international law[26].

About the European Union, a distinction should be made between soft law of an administrative nature issued by the Commission and soft law with an institutional or constitutional impact relevant to the relations between the Union bodies and

[23] CCR – Judgement no. 22/2016, M.Of. no. 160/ 02.03.2016.

[24] CCR – Judgement no. 62/2018, M.Of. no. 373/02.05.2018.

[25] Fajardo, Teresa. *Soft Law*, Website: http://www.oxfordbibliographies.com.

[26] Fajardo, Teresa, *op. cit.*

the Member States. This differentiation is required from the point of view of soft law purposes. In this respect, those of an administrative nature aim to provide additional legal certainty for legal subjects and the second category to areas where the Union has no regulatory competence. Also, depending on the intentions of the issuing bodies, soft law acts can have either a concretization or explanatory function, either preparatory or intermediate.

Soft law designates conduct rules that, in principle, do not have binding power but can have practical effects. They were positioned in a grey area, at the limit of law and politics. Although these provisions are indicative, from the perspective of the issuers, they should be given legal relevance[27)].

Some of the recommendations[28)] that Romania has received through the CVM[29)] report on the principle of legal certainty and the quality of law:

- The January 2017 report found that there were societal, legal and policy factors that, although not within the scope of the CVM and are not covered by its recommendations, "have a direct impact on the capacity to undertake reforms and, in particular, have made it harder for Romania to demonstrate that the reform has taken perennial roots". These elements include: a legislative practice that must elaborate the principles of better regulation, the confrontation between state actors and a difficult media context.
- The November 2017 report has already highlighted the need for the government and parliament to ensure an open, transparent and constructive legislative process in which judiciary independence and court judgments are properly assessed and taken into account.
- Currently, the laws of modified justice are in place. They contain a series of measures that weaken the legal safeguards on the independence of the judiciary, being liable to undermine the effective independence of judges and prosecutors and, therefore, public confidence in the judiciary. Appeal reactions from the judiciary and civil society have turned in this direction.
- The November 2017 report highlighted the potential of the Joint Special Committee of the Chamber of Deputies and the Senate to systematize, unify and ensure legal stability in the field of justice to establish a predictable change process, ensuring public debate and consultation[30)].

---

27) Iliescu, Ana Maria. *Jurgen Schwarze: Soft Law în dreptul Uniunii Europene*, Website: https://www.juridice.ro.

28) It should be remembered that by the Decision of the Constitutional Court of Romania no.2 / 2012, M.Of. no. 131/ 23.02.2012, recommendations in the MCV report are mandatory to be implemented in Romania.

29) European Commission, *Raport al Comisiei către Parlamentul European și Consiliu privind progresele înregistrate de România în cadrul mecanismului de cooperare și de verificare*, Strasbourg, 13.11.2018, pp. 2-3.

30) European Commission, *Raport al Comisiei către Parlamentul European și Consiliu privind progresele înregistrate de România în cadrul mecanismului de cooperare și de verificare*, Strasbourg, 13.11.2018, pp. 9-10.

– Members of parliament have argued that the legislative process is transparent and that it takes into account the opinion of the magistrate. It is true that the laws include amendments proposed by the magistracy itself. However, this is not true for most of the most controversial provisions that have been transposed into laws with little or no clarity on why the views expressed by the judiciary have been rejected. The extent of the problems raised by the Constitutional Court – only on constitutional issues – again highlights the low level of preparedness for these changes and the consequences of not using the expertise of key judicial institutions. As outlined by the Venice Commission and GRECO, when considering such fundamental legislative changes, it is to be expected that Parliament will hold a real debate on the needs of society and the impact of the changes on the basis of extensive consultations: these are issues of order public and it cannot be considered that the constitutional aspects analysed by the Constitutional Court are the only issue that is relevant.

5. Conclusions

Given the amount of legislation, regulatory quality requirements should be rigorous in the sense that law quality standards should come to ensure the accuracy of laws, and thus balance and efficiency.

For optimum results in the law-making process, cooperation between stakeholders remains an essential condition. The accuracy and clarity of the text have a particularly important role in the texts of the law. And clear and clear expression means that much work needs to be done on the text, which takes time and effort.

A hasty law may contain errors that will cause difficulties for people affected by the new rules. The benefit of the initial winning time will be lost later by correcting the errors, precipitation may cause new mistakes and thus create a vicious circle. Without a period of critical analysis of the text, the illusion that it will be interpreted accurately as the one who drafted it has been fed[31)].

It is the duty of the Ministries to have a substantiated motivation as to the necessity of the law and its effect in its integrity or individual article, as early as the drafting stage and at every stage of the legislative process.

Strengthening cooperation between EU Member States and other bodies supported by soft law, i.e. soft law, such as a Commission Communication or a Council Recommendation to stimulate the political commitment of the Member States and formulate a series of concrete recommendations to reduce the number of undesirable legal events, is a welcome approach to ensuring legal certainty and the quality of law.

[31)] Conseil d' Etat Belgique. 2008. *Principes de Technique Legislative – Guide de redaction des textes législatifs et réglementaires*, Bruxelles, p. 4.

REFERENCES

1. Bălan, Emil. *Prolegomene la o dezbatere privind codificarea administrativă*, in the Volume: *Codificarea administrativă. Abordări doctrinare și cerințe practice*, Bucharest, Romania: Wolters Kluwer Publishing House, 2018.
2. Conseil d' Etat Belgique. 2008. *Principes de Technique Legislative – Guide de redaction des textes législatifs et réglementaires*, Bruxelles.
3. European Commission, *Raport al Comisiei către Parlamentul European și Consiliu privind progresele înregistrate de România în cadrul mecanismului de cooperare și de verificare*, Strasbourg, 13.11.2018.
4. Fajardo, Teresa. *Soft Law*, Website: http://www.oxfordbibliographies.com.
5. G.E.O. no. 92/2018 for amending and completing some normative acts in the field of justice.
6. Moroianu Zlătescu, Irina. 2007. *Drepturile omului – un sistem în evoluție*, Bucharest, Romania: I.R.D.O. Publishing.
7. Muraru, I. and Tănăsescu, E. S. 2008. *Drept constitutional și instituții politice* – 13th Edition, Vol.1, Bucharest, Romania: C.H. Beck Publishing House.
8. Iliescu, Ana Maria. *Jurgen Schwarze: Soft Law în dreptul Uniunii Europene*, Website: https://www.juridice.ro.
9. Law no. 24/2000 on the normative technical norms for the drafting of normative acts.
10. Luca, Ion. 1922. *Raționalismul în Drept*, Bucharest, Romania: Cartea Românească S.A. Publishing House.
11. Safta, Marieta. *Valorificarea normelor de tehnică legislative în controlul de constituționalitate*, in Consiliul legislativ – Buletinul informativ, no. 2/2016, Bucharest, Romania: Monitorul Oficial Publishing House.
12. Vasilescu, Benonica. *Scurte considerații privind Codul administrativ*, in the Volume: *Codificarea administrativă. Abordări doctrinare și cerințe practice*, Bucharest, Romania: Wolters Kluwer Publishing House, 2018.

Romanian Constitutional Court (CCR)

1. CCR – Judgement no. 404/2008 M.Of. no. 347/ 6th of May 2008.
2. CCR – Judgement no. 26/2012, M.Of. no. 116/15.02.2012.
3. CCR – Judgement no. 686/2014, M.Of. nr. 68/27 January 2015.
4. CCR – Judgement no. 22/2016, M.Of. no. 160/ 02.03.2016.
5. CCR – Judgement no. 62/2018, M.Of. no. 373/02.05.2018.

European Court of Human Rights (ECHR)

1. ECHR – Judgement from 2nd of August 1984 in Malone v. UK.
2. ECHR – Judgement from 28th of March 1990 in Groppera Radio AG and others v. Switzerland.
3. ECHR – Judgement from 13th of July 1995 in Tolstoy Miloslavsky v. UK.

4. ECHR – Judgement from 28th of October 1999 in Brumărescu v. Romania.
5. ECHR – Judgement from 4th of May 2000 in Rotaru v. României.
6. ECHR – Judgement from 22nd of March 2005 in Roşca v. Moldova
7. ECHR – Judgement from 6th of June 2005 in Androne v. Romania.
8. ECHR – Judgement from 1st of December 2005 in Păduraru v. Romania.
9. ECHR – Judgement from 24th of May 2007 in Dragotoniu and Militaru-Pidhorni v. Romania.
10. ECHR – Judgement from 6th of December 2007 in Beian v. Romania.
11. ECHR – Judgement from 7th October 2009 in Stanca Popescu v. Romania.

ECHR – Judgement from 13th of July 2010 in Ahmed v. Romania.

ABOUT THE AUTHOR

Elena Constantin, PhD at the National School of Political Studies and Public Administration, Bucharest, Romania.

Email: constantinelena@yahoo.com