Rule of Law in Romania: The Quality of the Law as a Constitutional Standard

Bianca Selejan-Gutan

Abstract Deutsch

In der Rechtsprechung des rumänischen Verfassungsgerichtshofs ist die Qualität des Rechts in den letzten Jahren zu einem Diskussionsthema und gleichzeitig zu einem Verfassungsmaßstab geworden. Dieser Standard ist jedoch nicht als Ergebnis einer unabhängigen Auslegung des rumänischen Gerichtshofs entstanden, sondern durch die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte in das Verfassungsvokabular des Gerichtshofs eingegangen. Dieser Artikel versucht aufzuzeigen, wie diese bekannte Norm des Straßburger Gerichtshofs Eingang in das rumänische Verfassungsrecht gefunden hat.

Abstract English

In recent years, the quality of the law has become a topic for debate and at the same time a constitutionality standard in the case law of the Romanian Constitutional Court. However, this standard has not appeared as a result of an independent interpretation of the Romanian Court, but it penetrated the constitutional vocabulary of the Court via the case law of the European Court of Human Rights. This article attempts to show how this well-known standard of the Strasbourg Court has entered into the Romanian constitutional law.

The Romanian Constitutional Court has adopted and more and more frequently applied, in the last years, the quality of the law as a standard of constitutionality, in the process of abstract and concrete constitutional review. The present contribution analyses the source of inspiration of the Romanian Court – the case law of the European Court of Human Rights – and presents some relevant cases in which it has applied this standard.

1. The quality of the law in the case law of the European Court of Human Rights

The standards of the quality of the law have been a pillar of the case law of the European Court of Human Rights (hereinafter ECtHR) especially as regards the claims of violating Articles 5, 6, 8, 10 and 11 of the Convention. In time, the European Court has developed in its case law a comprehensive set of standards for the quality of the law as a guarantee of the respect of the rights protected by the Convention, "in order to allow the individual to adapt its behaviour and to benefit from an adequate protection against the arbitrary".[1]

1 ECtHR, *Sunday Times v. United Kingdom Uni* (1979), *Olsson v. Sweden* (1988).

The elements of the quality of the law standard, in the view of the ECtHR, are the following: the accessibility or the requirement that the law be accessible to the public[2] ; the clarity or the requirement that the law be precise and intelligible to the public; the predictability, which is closely linked to the clarity requirement.

The Court has defined the requirement of clarity as satisfied "where it is possible to say, on the basis of the relevant legal provision, what acts or omissions will entail criminal responsibility, even if this has to be determined by the courts interpreting the provision concerned."[3] This clarity requirement has been also analysed in the scholarship by reference to its own "clarity": "the clarity objective is an ambiguous ideal. Clarity can be understood from a linguistic point of view […]. But […] it can also be seen from a more legal angle: the one of the "concreteness", placing the emphasis on the precision of the statement".[4]

The distinction between clarity and intelligibility is made in other systems, too. For instance, the French Conseil Constitutionnel distinguished between the principle of the clarity of the law (clarté de la loi), which can be deduced from Article 34 of the French Constitution and the "objective of constitutional value of accessibility and intelligibility of the law", founded on Articles 4, 5, 6 and 16 of the 1789 Declaration of the Rights of Man and Citizen. The latter's purpose is "to protect the subjects of the law against an interpretation contrary to the Constitution or against the risk of arbitrariness, without transmitting to the administrative or jurisdictional authorities the charge to establish the rules the determination of which was confided by the Constitution only to the law".[5] Thus, clarity and intelligibility become two different goals, but they can be interpreted as stemming from one another: "The former is a principle linked to the legislator's competence, which the latter could overcome: a law could be clear being, at the same time, uselessly unintelligible".[6] The intelligibility becomes, thus, almost synonymous to the accessibility (in the substantive meaning).

As regards the third element, the predictability, it is closely linked to the clarity requirement: a clear law is necessarily predictable from the point of view of its effects on the subjects. According to the European Court, "the scope of the notion of predictability depends to a large extent on the contents of the relevant text, on the field it covers as well as on the number and quality of its recipients. The predictability of a law does not prevent the concerned person to make recourse to informed counsel in order to evaluate, to a reasonable degree in the circumstances of the case, the consequences that may result from a specific act".[7]

2 ECtHR, *K.-H.W. v. Germany* (2001).
3 ECtHR, *Sunday Times*, precited, § 49.
4 Alexandre Fluckiger, 'Le principe de clarté de la loi ou l'ambiguité d'un idéal', (2007) 21 Cahiers du Conseil Constitutionnel, accessible at https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-principe-de-clarte-de-la-loi-ou-l-ambiguite-d-un-ideal.
5 *Conseil Constitutionnel, déc. 514/2005,* see Fluckiger, supra, note 4.
6 Ibidem.
7 ECtHR, *Gherghe and Gună v. Romania* (decision of the committee, 2019, available only in French. The English translation belongs to the author).

What is the contents of this positive obligation to respect the quality of the law? Professor Frédéric Sudre pointed out that the requirements of precision and predictability of the norm are relative: "the clarity of the law can be assessed only if the interested person benefits from 'enlightening advice'"[8] (as the ECtHR itself stated in the above-mentioned case Sunday Times v. UK). Therefore, the analysis of the conformity with these requirements is made on a case-by-case basis, by taking into account certain variables: the field of regulation, the number and quality of recipients etc. The required level of clarity and predictability can thus be both very high in the criminal law field and lower in other fields such as telecommunications[9], pharmaceutical industry[10] or even in the field of constitutional amendments, whose level of precision can be lower than the one of the ordinary laws.[11]

To conclude, the complex requirement of the "quality of the law", as interpreted by the European Court of Human Rights, is considered as a component of the principle of legal certainty and, impliedly, of the rule of law, which is, in the Court's own words, "inherent to the law of the Convention".

2. The Romanian Constitutional Court and the quality of the law

The Romanian Constitutional Court had as a source of inspiration the case law of the ECtHR in developing its own standard of constitutionality regarding the quality of the law. This standard has two components: a complex, "international" substantive one, inspired by the ECtHR, and consisting in the clarity, accessibility and predictability and a "domestic" formal one, concerning the respect of the national rules on legislative technique.

The examples below reflect this rather recent perspective of the Romanian Constitutional Court, a case law that is still evolving, but which has already started to produce effects on the Romanian national legislation.

At the beginning, the referential norm concerning the quality of the law, used by the Romanian Constitutional Court, was located in the chapter of the Constitution on fundamental rights: Articles 21 and 23(12), concerning the free access to justice and the individual freedom (more precisely the principle nulla poena sine lege), especially in decisions dating back in 2009–2011. In a second "wave" of case law, the Court started to have a more general approach, by deducing the requirements of the quality of the law from Article 1(5) of the Constitution, which is located in the general principles chapter and according to which "in Romania,

8 Frédéric Sudre, *Droit européen et international des droits de l'homme,* 12e édition refondue (Paris, PUF, 2015) 207.

9 ECtHR, *Groppera Radio AG v. Switzerland,* 1990.

10 ECtHR, *Cantoni v. France,* 1996.

11 ECtHR, *Rekvenyi v. Hungary,* 2000.

the respect of the Constitution, of its supremacy and of the laws is mandatory".[12] This approach started in 2014 and continues presently.

The Romanian Constitutional Court was certainly inspired by the case law of the European Court of Human Rights in defining and analysing the components of the quality of the law standard. Thus, it established that a law, in order to be accessible, must not only be published, but it should exist a logical connection between the norms of a certain field, including as regards the legal force. Therefore, the respect of the norms of legislative technique is so important.

Concerning the notions it used, the Constitutional Court stated, for example, that "the requirement of the clarity of the law means that the regulation has a non-equivocal character, the precision refers to the exact character of the legislative solution and of the used language, and the predictability aims at the purpose and consequences of the law".[13]

According to the Court, one cannot pretend from a legal subject to respect a law which is not clear and predictable "because s/he could not have a behaviour adapted to the normative hypothesis of the law".[14]

The Constitutional Court also referred to the deduction, from these rules, of the principle of legal primacy, which is indirectly included in Article 1(5) of the Constitution, especially in the criminal law field, but also in other fields of regulation.

In a decision from 2019[15], the Court develops a "theory" of the requirements of the quality of the law, by emphasising its link with the rule of law principle: "the accessibility and the predictability are requirements of the principle of legal certainty and constitute guarantees against arbitrariness; the role of the constitutional review [of legislation] is to ensure the respect of these guarantees, opposed to any arbitrary initiative […]. The absence of motivation of the legislative solutions can breach the dispositions of Article 1(3) of the Constitution, which enshrines the rule of law and the principle of justice […]."

By reference to the implications of these standards in specific cases, I must mention, for example, Decision no. 553/2015, where the Court acknowledged the importance of the clarity of the law for the field of criminal procedure, especially when it comes to deprivations of liberty. The procedural norm must indicate in an exhaustive and clear manner the cases in which the deprivation of individual freedom are permitted, otherwise it is unconstitutional.

In a decision from 2018,[16] the Court held that in relation to the activity of surveillance of telephonic calls, by reference to the requirements of the ECtHR, one must "emphasise the respect of the requirements of the quality of the domestic

12 A brief analysis of this evolution was provided by Karoly Benke in his doctoral thesis *Prezumtia de constitutionalitate a normelor juridice penale [*The presumption of constitutionality of criminal legal norms], Iasi, 2016.

13 Romanian Constitutional Court, Decision no.183/2014.

14 Romanian Constitutional Court, Decision no. 682/2018.

15 Romanian Constitutional Court, Decision no. 139/2019.

16 Romanian Constitutional Court, Decision no. 91/2018. See also Decision 51/2016, par. 44.

law which, in order to be compatible with the principle of the rule of law, must fulfil the conditions of accessibility (the norms which govern the matter of communication surveillance must be drafted in a fluent and intelligible manner, without grammatical difficulties and without obscure or equivocal passages, in a specifically legal language and style, concise and sober […]), precision and predictability (lex certa, the norm must be written with high precision, in order to allow any person – who can, if necessary, seek specialised counsel – to adapt its behaviour and to be capable of foreseeing, in a reasonable manner, the consequences derived from a certain act)."

In Decision no. 51/2016, the Court found the unconstitutionality of Article 142 of the Code of criminal procedure and held that the investigating organs are the only ones that can participate in the achievement of surveillance activities that can constitute evidence before a court. The Constitutional Court also found that the expression "or by other state organs" comprised in the said article (i.e. organs that might participate in the mentioned activities) lacks clarity and predictability, which are required by Article 1(3) of the Constitution on the rule of law. Moreover, the Court invoked the principle of legality, contained in Article 1(5) of the Constitution.

In 2019, the provisions of Article 126(6) of the Code of criminal procedure were declared unconstitutional for lack of clarity and predictability. According to the Court, the fact that the said dispositions did not establish either the judicial organ competent to pronounce measures of witness protection or the acts and manner of exercising the said competence, constitute a lack of clarity and predictability contrary to Article 1(5) of the Constitution.[17]

In the context of the state of emergency declared during the Covid-19 pandemic, the Constitutional Court ruled, in Decision no. 152/2020, that Article 28 of the Emergency Government Ordinance 1/1999, which defines the administrative offences during a state of emergency, lacks clarity and predictability in that it does not differentiate between the various degrees of gravity of the offences, therefore leaving room for arbitrariness from the part of the agents when applying the fines.

In June 2020, the Parliament adopted some changes to the Law on National Education aimed at introducing a prohibition "in education institutions and in all spaces destined to education and professional training, of all activities meant to spread the theory or opinion on gender identity, understood as the theory or opinion that gender is a concept different from biological sex". The amendment law was challenged at the Constitutional Court by the President of Romania, in the framework of the a priori judicial review. The Court, in Decision no. 907/2020, decided that the impugned text was unconstitutional on several grounds, among which the breach of quality requirements. Firstly, it stated that gender equality is a major goal in all member states of the Council of Europe and of the European Union and quoted from the case law of the European Court of Human Rights and of the Court of Justice of the European Union on the matter. Secondly, the Court ruled that the impugned text violates Article 29 of the Constitution (freedom of

17 Romanian Constitutional Court, Decision no. 248/2019.

conscience) and human dignity: "a prohibition for the teaching staff and for pupils and students […] of any act to impart knowledge on gender identity, contrary to those opinions imposed by the state […] is contrary to human dignity". Thirdly, said the Court, the text violates Article 32 of the Constitution concerning the right to education and Article 30 on the freedom of expression. And finally, the impugned text was also considered unconstitutional as being "contrary to the legal logic and lacking any reasonable motivation", as well as setting a "confusing and contradictory normative framework".

Nevertheless, the quality of the law has not always been used by the Constitutional Court as a standard of constitutionality for the safeguard of fundamental rights. A controversial decision was adopted in the context of the anti-corruption fight – one of the main objectives required by the Co-operation and Verification Mechanism which was established when Romania became a member of the European Union. This decision affected the outcome of cases pending before ordinary courts. In Decision 405/2016, the Court held that the wording "faulty execution", comprised in the definition of the offence of abuse of office is lacking clarity and predictability and, at the same time, offered "the only possible interpretation" of this wording, which, allegedly, would make it compatible with the Constitution: "faulty execution means [only] the violation of a law", the word "law" being understood in its narrow sense, of primary regulation, i.e. law or government ordinance.[18] By declaring the original text unconstitutional and by adding a definition which transformed its contents, the Court became a "positive legislator", in breach of its Kelsenian role of negative legislator as defined by its own law. In practice, this decision has affected numerous criminal trials pending before the ordinary courts.

Another remark of the Court on the quality of the law in the same decision was that the offence of abuse of office did not comprise a threshold of the damage in order to qualify the actions as a criminal offence, which would constitute a lack of precision of the norm. However, this time the Court did not impose a certain amount as a threshold, leaving the task to the legislator. In January 2017, the new government installed after the elections of December 2016, tried to modify the Criminal Code by means of an emergency ordinance which imposed a threshold of approx. 42.000 Euros (a very low threshold that would have had as a consequence the end of most of the trials for abuse of office). This ordinance generated strong anti-government protests and criticisms from the European institutions[19] and was finally repelled. The modifications to the Criminal Code are still pending in Parliament.

In the field of the integrity of public dignitaries, especially of members of Parliament, the Court found unconstitutional for lacking accessibility the dispositions

18 For the distinction between laws and government ordinances in the Romanian system, see Bianca Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis.* (Bloomsbury-Hart Publishing 2016) 131.

19 For details, see Bianca Selejan-Guțan, *'We Don't Need No Constitution' – On a Sad EU Membership Anniversary in Romania, VerfBlog,* 2017/2/01, https://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/.

of a law which attempted to change the law on public integrity by removing the incompatibility between certain public offices and the quality of individual merchant. In the Court's view, the unconstitutionality stemmed from the fact that the different incompatibilities were provided by different normative acts which were not always correlated, therefore lacking accessibility and predictability: "the legislator has the competence and, at the same time, the constitutional duty (…) to adopt normative acts by observing the principle of the uniqueness of regulation, according to the Law no 24/2000 [on legislative technique], especially when the regulations having an equal force and having the same object must be included in a single normative act."[20] Thus, although the principle of the uniqueness of regulation is included in a law and not in the Constitution, the Court extended its scope by referring to it as a part of the principle of legal certainty and therefore of the rule of law, which is entrenched in Articles 1(3) and 1(5) of the Constitution.

The Constitutional Court gave a wider interpretation of the quality of law requirements in Decision 153/2020. Thus, the clarity and predictability were analysed from the perspective of the legislative bill and its motivation (exposé des motifs). The Court applied again as norms of reference not only the constitutional norms, but also the dispositions of the law on the legislative technique, making a "horizontal" application of the standards of the quality of the law: "In its case law, the constitutional jurisdiction held that the lack of well-founded justification of normative acts and the concise character of the instrument of presentation and motivation [of bills] violate the requirements of clarity and predictability of the law and the legal certainty imposed by Article 1(5) of the Constitution".[21]

Thus, the Court transformed the prior motivation of normative acts in a condition from which derive the clarity and predictability. This interpretation is doubtful and lacks, at its turn, clarity and predictability. In the Court's view, this motivation would have the role of "preventing the arbitrariness in the legislative activity, by ensuring that the laws proposed and adopted respond to real social needs and to the social justice". However, this is a rather artificial and even dangerous construct, because the motivation of laws could be vague without really affecting the contents. Moreover, the legislator is not bound, in adopting a bill, by the motivation of its initiator. Therefore, to attach a constitutional value to the motivation of a bill is excessive and could lead to controversial decisions of unconstitutionality, determined by various political interests.

The Constitutional Court explained again the notion of predictability in Decision no. 121/2020, this time by reference to the author of norms subsequent to a law. The case concerned the possibility, established by the law on the status of magistrates, of the Superior Council of Magistracy, to adopt, by means of its own regulations on the organisation of the admission in the judicial profession, the rules on "essential" aspects regarding the position of judge or prosecutor. "The delegation [by the law] of the competence of adopting these norms to the Superior

20 Romanian Constitutional Court, Decision 104/2018.
21 Romanian Constitutional Court, Decision no.153/2020.

Council of Magistracy is contrary to the requirement of the predictability of the law and, consequently, unconstitutional".

3. Conclusion

The Romanian Constitutional Court, by adopting and applying the standards of the quality of the law, does not make the distinction – specific, so far, to the French Constitutional Council – between the constitutional principle of the clarity of the law and the "constitutional value" objective of intelligibility of the law. The Romanian jurisdiction prefers to invoke the standards of the European Court of Human Rights, developed in the latter's case law, where it applies the requirements of clarity and predictability. Nevertheless, the Constitutional Court sometimes used these requirements in order to bypass a more thorough constitutional review, in rather controversial decisions which did not have a true impact on the protection of fundamental rights.

This standard of constitutionality is important and its imposition to the legislator is, undoubtedly, an essential component of the rule of law. Which was the impact of this standard, as imposed by the Constitutional Court, on the Romanian legislation? By taking into account that this standard is relatively recent in the Romanian Constitutional Court's case law, a clear answer cannot be given yet. There were attempts to change the legislation following the Court's decisions, especially in the criminal law field, but not all of these changes were finalised and many of them were criticised by the scholarship and by European institutions for impairing the fight against corruption, against organised crime or the legal regime of other offences.

The role of the legislator in this equation is important, but not unique. The role of the Constitutional Court remains important, but also the role of the ordinary courts cannot be neglected. The ordinary courts could at least challenge a law before the Constitutional Court if they consider that it lacks the quality requirements in order to be adequately applied. Certainly, the assessment of the quality requirements is still relative, as there is no single standard, but their constant application could prove useful in a wider context, if all the concerned authorities become conscious of its importance for the achievement of the rule of law.

Bibliography

Fluckiger, Alexandre: 'Le principe de clarté de la loi ou l'ambiguité d'un idéal', (2007) 21 Cahiers du Conseil Constitutionnel, accessible at https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-principe-de-clarte-de-la-loi-ou-l-ambiguite-d-un-ideal.

Selejan-Gutan, Bianca, Tănăsescu, Elena-Simina: 'Romania' in Richard Albert, David Landau, Pietro Faraguna, Simon Drugda (eds), 2019 Global Review of Constitutional Law, (Boston College 2020).

Selejan-Guțan, Bianca: The Constitution of Romania. A Contextual Analysis. (Bloomsbury-Hart Publishing 2016).

Selejan-Gutan, Bianca: *'We Don't Need No Constitution' – On a Sad EU Membership Anniversary in Romania, VerfBlog,* 2017/2/01, https://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/.
DOI: 10.17176/20170201-170532.

Sudre, Frédéric, Droit européen et international des droits de l'homme, 12e édition refondue, (Paris, PUF, 2015).