ACCEPTANCE OF THE PRINCIPLE OF CONSTITUTION SUPREMACY AND OF ITS CONSEQUENCES IN THE NEW CRIMINAL CODES

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Abstract

The main consequence of constitutional supremacy is the compliance of the entire law with constitutional rules. Ensuring full respect of this principle, essential to the rule of law, is primarily an attribute of the Constitutional Court, but also an obligation of the legislative power to accept constitutional rules, via legal acts adopted in terms of contents and form. The new penal codes'entry into force has led to a significant case law of the Constitutional Court on the control of constitutionality of some regulations in the Criminal Code and Criminal Procedure Code.

We aim to examine the following key issues in this study: a) the manner in which the constitutional principles and values embodied in some criminal and criminal procedural norms of the new codes were realized; b) the effects of Constitutional Court decisions in the constitutionalisation process of the criminal law; c) enforcement of decisions made by the Constitutional Court to trials, particularly those through which the new Criminal Code regulations were found unconstitutional.

Keywords: *Supremacy of Constitution, constitutionality of some regulations in the new criminal codes, effects of Constitutional Court decisions in criminal law, application of Constitutional Court decisions in criminal proceedings.*
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1. Brief considerations on the principle of Constitution's supremacy

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (…) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into

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State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy*. However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy" (Deleanu, 2006).

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a country" (Muraru & Tănăsescu, 2009). Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Article 1 para. 5, of the basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n,) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State" (Ionescu, 2015).

In applying these considerations to the regulatory reality of the new Criminal Codes, we note that the Constitutional Court has, within a relatively brief time-span since they were adopted, granted numerous exceptions of unconstitutionality, finding an important number of rules in the Criminal code and Criminal Procedure Code to be unconstitutional; in our opinion, this matter raises three issues:

The first takes regard of the constitutionality of the Parliament's legislative activity, which led to Penal Codes being adopted. Given the large number of exceptions of unconstitutionality granted, we believe that legislator's concern to comply with the principle of supremacy of the Basic Law under its simplest form, i.e. compliance of standards in the Criminal code and Criminal Procedure Code with the Basic Law of the country has not been a priority of the law-making process in this matter;

The second issue takes regard of the specific process of criminal legislation's constitutionalisation via decisions rendered by our constitutional court. We are considering both decisions rendered by the Constitutional Court whereby exceptions of unconstitutionality concerning the penal codes' rules have been dismissed, which by the rationale brought forward contribute to law's constitutionalisation process, but especially decisions whereby certain normative provisions were found to be unconstitutional.

A third issue regards acceptance by the infra – constitutional lawmaker, in drafting the two Criminal codes, of certain constitutional normative provisions, principles and reasons of the Basic Law, which are important to the whole codification work in criminal matters.

This study dwells on the latter aspect, which has been less approached by the specialty literature and cannot be the subject matter of constitutional review before our constitutional court, since it operates as a "negative lawmaker" and may not, consequently, penalize potential omissions of the infra- constitutional lawmaker to take over aspects of the Constitution's legislative content in the law drafted and adopted We especially bear in mind the constitutional principles based upon which the entire legal system of Penal Codes is structured on.

2. Constitutionality and constitutionalisation of some regulations in Criminal Codes

The lawmaker has not shown a particular interest in enshrining general principles of law in the Criminal code and Criminal procedure code, especially those whose origin derives from constitutional rules whereby a systemic and explanatory cohesion is conferred to the whole legislative content of the codes, to which the one enforcing and construing penal law may relate.

It is our belief that regulatory expression into the two Criminal Codes of certain general principles of law which are constitutional principles as well by their nature, would have led to a high level of constitutionality for the two

legal acts through better harmonization of their legal content to the rules of Basic Law. This high level of constitutionality would have led to the functional stability of codes and their effectiveness.

The importance of the principles of law to the entire legal system's cohesion and harmony has been examined and highlighted by the speciality literature (Andreescu, 2016; Craiovan, 1998; Dabin, 1953; Mihai & Motica, 1997; Popa, 1999). The principles of law give legitimacy and coherence to the rules comprised by the contents of a law. In that regard, Mircea Djuvara observed: "To have a serious and methodical research, all that the science of law really consist of is drawing the essential from the multitude of provisions, i.e. precisely these ultimate principles of justice from which all the other provisions derive. This way the entire law becomes clearer and what is called legal spirit catches roots. It is only in this manner that the scientific preparation of a law can be achieved" (Djuvara, 1999). The words of the great philosopher, Immanuel Kant, are just as significant: "It is an old desire that who knows, maybe shall once come true: to be discovered, instead of the infinite variety of civil laws, their principles, for it is only the secret of simplifying, as it is called, legislation" (Kant, 2008).

In terms of legislation, the source of every legal branch's principles and especially of a code must first be constitutional rules which, by their nature, consist of maximum generality rules which represents the ground, but also the source of legitimacy for all the other legal rules.

The criminal code does not have a title meant for the general principles applicable in this field, and in the Criminal Procedure Code, Title I regulates both aspects concerning principles, and limits as to enforcement of criminal law. We believe this legislative technique is faulty, since it does not clearly and differently individualize the general rules of criminal procedure, considered to be principles with normative value. The lawmaker's normative solution, which is found in the Criminal code, is even faultier in relation to the one enforced by the Criminal procedure code. Chapter I's normative content, under the marginal name " General principles " from Title I with the marginal name "Criminal law and its boundaries of enforcement" normatively regulates in fact one principle, i.e. "Legal certainty in criminal law and criminal law sanctions". The second chapter from Title I of the Criminal code is dedicated to regulating the criminal law's enforcement in time". For the above-stated considerations, we believe it would have been useful, for a coherent systematization of the regulatory provisions and constitutional legitimacy of the Criminal code, including for the correct interpretation and enforcement of criminal rules, explicit normative expression of the constitutional principle of law activity, enshrined din the provisions of Art.15 par. 2 of the Constitution, accompanied by regulation of particular aspects specific to criminal law in Title I of Chapter I in the Criminal code.

There are other principles registered in the Constitution, which, in our opinion, would have had to find the specific normative expression in the Criminal code and in the Criminal procedure code. The final goal of the entire criminal legislation, but also criminal proceedings, is represented by the guarantee of the rights and fundamental freedoms of man, believed to be the basic component of social and rightful order and a significant request of the rule of law. As specialized literature constantly underlines, the principle of respecting human dignity is the key to fundamental freedoms and rights and, at the same time, the purpose of guaranteeing them by law, but also by institutional –procedural means and mechanisms.

Human dignity is one of the constitutional principles enshrined explicitly in the provisions of Article 1 para. 3 of the Constitution, being deemed to be defining for the rule of law. The legal consequence from acknowledging human dignity as a constitutional principle and value is the obligation of State's authorities, including judicial ones, to refrain from any actions or measures that may harm man's personality both in its biological dimension, and spiritual, rational or moral ones and, at the same time, positive obligation to enforce the measures necessary to comply with this important dimension of human existence. This aspect is very important in terms of criminal proceedings and, generally, to the whole criminal legislation, because it regulates the enforcement of restrictive and coercive measures specific to criminal instruction whereby values such as individual freedom may be narrowed, limited or conditioned. According to the principle of respecting human dignity, any criminal-related restrictive or coercive measure may not prejudice the existential elements of the human person by which the quality itself of human is defined. We take regard both of the biological dimension, and the spiritual, rational and moral ones of man.

The essence of this obligation, which may be transposed into legal rules and formulas, of guaranteeing and not prejudice human dignity under any circumstance is at the same time a dictum of practical reasoning to which Immanuel Kant referred: " Persons must be treated always as an end and never as a means only" (Kant, 2013). We underline the idea, without attempting to develop the theoretical aspects more in this study, that complying with this essential value should be one of the most important requirements, found by regulatory enshrining in the criminal law.

To that regard, we make the mention as an example that judicial individualization of penalties needs to have the respect for human dignity as the ultimate rationale and all that it means in terms of complex, biological, rational and moral dimensions of man, seen as a person, not a mere item (individual) in the State, social and relationship-related system.

The lawmaker has not enshrined human dignity as a principle in the Criminal code, nor did they set from a regulation point of view the obligation to abide by this value. We believe this legislative omission is a minus of

constitutionality of the Criminal code, since the effectiveness due to the supremacy of the Basic law has not been given to it; among other things, it imposes the lawmaker 's obligation to materialize the principle of human dignity as a fundamental value of the substantive criminal law. The need for such a regulation enshrining derives from the nature of criminal liability itself, centred particularly on elements of legal constraint.

Unlike the Criminal code, this principle is enshrined in the legislative content of the Criminal procedure code in Article 11 under the marginal name "Respect for human dignity and private life". In this case too, we notice that for a correct systematisation of the rules in the Criminal procedure code, this principle would have had to be enshrined in a special title dedicated to the general principles of criminal proceedings. The principle of respect for human dignity, even if it would be enshrined in the legislative enshrining, as is the case of the Criminal procedure code, has an almost exclusively theoretical and formal value, since procedural penalties are not regulated in the event of its violation during criminal proceedings.

The provisions of Article 1, para. 3 of the Constitution, with regard to the characters of the Romanian state list, among other things, as a key component of the rule of law, democratic and social State, enshrining the rights and freedoms of citizens, as supreme values, understood by reference to the Romanian people's democratic traditions and the ideals of the Revolution from December 1989. According to the same constitutional rules, the rights and freedoms of citizens, as supreme values of the State are guaranteed.

In consideration of these constitutional provisions, we believe that the principle of guaranteeing and respecting the rights and freedoms of citizens, especially if their exercise might be subjected to certain conditions, limitations or restraints, is key to substantive criminal legislation, but also for the criminal proceedings. For the reasons described above, we believe it would have been useful if, in a chapter dedicated expressly and exclusively to the general principles of criminal law and criminal proceedings law from the new Criminal codes, the lawmaker would have regulated expressly the principle according to which *the respect and guarantee of the rights and freedoms of citizens is an obligation of judicial authorities in enforcing criminal law.* It would have also been useful, in the event of such regulation, to provide penalties in case of failure to comply, on the part of judicial authorities, with the subjective rights and freedoms and first of all, the constitutional fundamental rights. Failure to comply with the rights and fundamental freedoms in the course of judicial proceedings may constitute an abuse of power by the State's authorities, and the penalty applicable in this case may only be absolute nullity of any adjective law or procedural that would prejudice such rights unduly.

The constitutional principle of equal rights and the principle of non-discrimination, enshrined in the provisions of Article 16 para. (1), i.e. Article 4

para. (2) of the Constitution, have not been taken over and, consequently, enshrined as specific principles for criminal law and criminal procedural law in the two Criminal codes. There is no need to emphasize the importance of the two constitutional principles, particularly for the criminal proceedings and the need to enshrine them both in the Criminal code, and in the Criminal procedure code, by capitalizing the doctrine and case law in the matter.

As an example, we are considering a particular aspect of the equality principle, i.e. what the doctrine and case law calls "equality of arms", key element to the proper carry out of criminal proceedings.

The principle of proportionality is enshrined by the constitutional rules, whether explicitly or implicitly. The provisions of Article 53 of the Romanian Constitution, in their explicit form, enshrine it as a requirement if the exercise of certain rights is restricted. At the same time, we notice that proportionality is a general principle of domestic law, but also a fundamental principle of the European Union law. The most important procedural dimension of this principle refers to the idea of correspondence, fair adequacy of a national level decision to the actual situation and the legitimate goal pursued. Abiding by this principle confers not only legality to the State authorities measures, but also legitimacy, materializing in this manner the value dimension of the State action by specific reference to essential values, such as: justice, fair measure, equitableness, but also compliance with the diversity of the actual situation within the generality of the legal standard. Otherwise put, proportionality is the principle by which the general and impersonal normative regulation materializes (Andreescu, 2007; Lazăr, 2004; Tofan, 1999).

The space dedicated to this research does not allow us to go into details; however, we believe professor Ion Deleanu's statement is an example with regard to this principle: "Thus and in short, putting proportionality in place - contextualized and circumstantial – involves passing from the rule to the metal – rule, from normativity to normality, from making hypotheses before the legal rule to discovering and valorising meaning and its purpose. In such reasoning, reference criteria are, above all, the ideals and values of a democratic society, taken into consideration by convention (European Convention for the Protection of Human Rights and Fundamental Freedoms n.n.) and, as a matter of fact, the only one compatible with it (Deleanu, 2008).

The goal in applying this principle in criminal proceedings is to avoid and, we would say to sanction the abuse of power by the judicial authorities. Criminal institutions where the principle of proportionality must be applied frequently consist of individualization of criminal penalties and enforcement of preventive measures. This principle is not enshrined as a general principle neither in the Criminal Code, nor in the Criminal procedure code, as it would have been natural, in our opinion, having regard to the constitutional dimension of proportionality. However, there are regulations which are suggestive of proportionality, whether implicitly or explicitly. For example,

the provisions of Article 202, para. 3 of the Criminal procedure code refer to proportionality as a general condition as to the choice and enforcement of preventive measures. In return, the provisions of Article 74 of the Criminal code, regulating the general criteria for individualization of penalties, do not refer explicitly to the proportionality requirement. Nevertheless, abiding by such requests could arise from the systematically interpretation of the general individualization criteria to which this legal text refers.

For the above considerations, we believe it is necessary, based upon the principle of Constitution's supremacy, to explicitly enshrine the principle of proportionality as a general principle both in the Criminal code, and in the Criminal procedure code. This way, a systematic materialization of the principle's procedural aspects would be achieved in relation to the two criminal institutions we referred above.

The provisions of Article 53 of the Basic law, under the marginal name "Narrowing the exercise of certain rights", institute an important guarantee if some measures constituted as boundaries, conditions or restraints are applied, aiming to a subjective law and particularly the fundamental constitutional rights. The constitutional rule establishes the fundamental guarantee, according to which any restrictive measure aiming at a subjective law may be applied *only to its exercise and cannot prejudice the law substance itself.* In our opinion, this constitutional requirement transposed into criminal law is an important guarantee of compliance with subjective laws and particularly human fundamental rights, especially if, by coercive measures, their exercise could be restraint, conditioned or limited.

None of the two Criminal codes take over this constitutional requirement from a regulatory standpoint. We believe it would be useful, having regard to the rationale set out above, that there is a special chapter, dedicated to the general principles of criminal proceedings, which would specifically provide that "*no preventive measure* should *prejudice the substance of subjective law, this aiming solely at the exercise of a right"*. In practical terms, an important guarantee is established for subjective rights and freedoms if, their exercise is restraint or limited via preventive measures. Specifically, an essential criterion is created in order to assess the reasonableness of the preventive measures' length.

We would like to refer, in a few brief considerations, to another important aspect concerning constitutionality of the new Criminal codes, i.e. potential inadequacies between the Constitution rules and provisions of the Criminal codes, aspects that, to this date, have not been subject to the Constitutional Court's review, nor was the specialty doctrine.

The provisions of Article 23 of the Basic law enshrine the right to individual freedom and list the preventive measures by which the exercise of this right is susceptible to restraint. Pursuant to the provisions of Article 23, para. 3 and 4, these preventive measures are holding and provisional detention.

The Criminal procedure code, in Title V, Chapter I, regulates other three preventive measures that are not mentioned by the constitutional text. It is about house arrest, judicial review and judicial review on bail. The question is raised whether there are legal consequences on account of this difference in regulation between the Constitution and special law, considering that, by its content, Article 23 of the Basic Law is an analytic, descriptive one, the constitutional lawmaker's purpose being to guarantee 'the fundamental right to individual freedom by the Constitution's legal force itself. In our opinion, there are no aspects as to unconstitutionality by the fact that the three preventive measures regulated by the Criminal procedure code are not mentioned in the constitutional text as well. It is our belief that the list made by Article 23 of the Constitution with regard to preventive measures, has merely an enumerable characteristic, not exhaustive. Consequently, special law can regulate other preventive measures too, under the condition that constitutional reasons are complied with, as shown by the above-mentioned regulations with regard to the guarantee of individual freedom.

The Constitutional Court's case law in this matter comes to confirm such doctrine interpretation. By Judgment no. 740/3.11.2015[1] the exception of unconstitutionality was granted and the provisions of Article 222 par. 10 of the Criminal procedure code were found to apply. Also relevant to our analysis are the considerations for which the constitutional court issued a ruling to such regard: "However, Court holds that the constitutional rule under review must be construed in a broad sense, as limiting the maximum length of arrest, during prosecution, to 180 days, irrespective whether the arrest is provisional or house arrest (…). Allowing the length of the two preventive measures of imprisonment to exceed the maximum limit of 180 days is to defeat the constitutional rule's requirements provided by Article 23 para. 5".

3. Some conclusions on the outcome of the Constitutional Court's decisions in criminal proceedings

One last point we would like to briefly analyse in this research: outcome of the Constitutional Court's decisions by which the unconstitutionality of certain regulations of the Criminal Code or Criminal procedure code was found out. Based upon the provisions of Article 147 par.1 of the Basic Law, the provisions of laws and ordinances in force found to be unconstitutional cease to produce legal effects 45 days after publication of the Constitutional Court's decision. During this time, the Parliament or, as applicable, the Government, are under the obligation to reconcile the unconstitutional provisions with the Constitution's provisions. Until such time, the provisions found to be unconstitutional are suspended as of right (Andreescu & Puran, 2015; Iancu, 2008; Muraru & Tănăsescu, 2008.

[1] Published in the Official Journal, 15 December (2015), Part I, no. 927.

It is particularly of practical interest the event where the lawmaker has not intervened to reconcile the normative provisions from the Criminal codes declared to be unconstitutional with the Constitution rules. There are several such instances where rules from the Criminal Code and the Criminal procedure code were found to be unconstitutional without the lawmaker interfering within the meaning of provisions of Article 148 para. 1 of the Basic Law. We consider, as an example, the provisions of Article 301 para.1 and Article 308 par. 1 of the Criminal code, whose unconstitutionality was found out by Decision no. 603/ 6 October 2015[2]; the provisions of Article 335 para. 4 of the Criminal procedure code[3] or the provisions of Article 347 para. 1 of the Criminal procedure code[4]. Also, we take regard of Decision no. 423/9 June 2015[5] finding the unconstitutionality of provisions of Article 488/ 4 para. 5 of the Criminal procedure code.

This circumstance may have, to a judge called upon to enforce the provisions of the Criminal code and the Criminal procedure code, a different solution depending on the specific matters held by the constitutional court for which the respective legal text was found to contravene the Basic law's rules. For that purpose, we may distinguish between interpretative decisions made by the Constitutional Court, by which constitutional grounds of the text under review become clear, and on the other hand, constitutional court's decisions by which the legal rule is removed as contrary by its contents to the respective rules of the Constitution. In the first circumstance, the judge enforces the criminal rule or criminal procedural rule and the grounds conferred by the Constitutional Court. In the second hypothesis, if the lawmaker fails to intervene, the rule found out to be unconstitutional may no longer be enforced.

Lawmaker's passiveness in reconciling the rules found to be unconstitutional with the correlative provisions of the Basic law may have serious consequences as regards the proper carry out of criminal proceedings. In practice, in order to avoid such circumstances, especially to the extent the regulations comprised by the Criminal procedure code, contrary to the principle of publicity as regards the trial hearing or participation of parties and of the prosecutor, courts have enforced general rules, primarily constitutional ones, which enshrine the principle of publicity of the trial hearing (Article 27 of the Constitution), as well as the equality principle, including in its particular form of equality of arms, as shown by the provisions of Article 16 in conjunction with Article 124 of the Constitution. This solution is fair, as the judge has, over the course of criminal proceedings, the option, and the

[2] Published in the Official Journal, 13 November (2015), Part I, no. 845.
[3] Found to be unconstitutional by Judgment no. 496/23, June (2015), delivered by the Constitutional Court, published in the Official Journal, 29 November (2015), Part I, no. 708.
[4] Found to be unconstitutional by Judgment no. 631, 8 October (2015), delivered by the Constitutional Court, published in the Official Journal, 6 November (2015), Part I, no. 831.
[5] Published in the Official Journal, 20 July (2015), Part I, no. 538.

obligation even to enforce directly constitutional rules and principles where the lawmaker has omitted to fulfil their obligation provided under Article 147, para. 1 of the Constitution or even if they enforce and construe a criminal rule or a criminal procedural rule.

We believe lawmaker's intervention is necessary in order to remove such inadequacies and to confer the Criminal Code and the Criminal procedure code a high degree of constitutionality.

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