RECEPTING THE PRINCIPLE OF SUPREMACY OF CONSTITUTION AND ITS CONSEQUENCES ON THE NEW PENAL CODE

Andreescu MARIUS*

Abstract

The supremacy of Constitution has as main consequence the compliance of entire law with the constitutional norms. Guaranteeing of the observance of this principle is essential for the rule of law, is primarily an attribute of the Constitutional Court, but also an obligation of the legislator to receive by texts adopted, within its content and form, the constitutional norms. Entering into force of the new criminal codes generated a significant jurisprudence of the Constitutional Court on the verification of constitutionality of some regulations in the Criminal Code and Criminal Procedure Code.

Through this study we intend to analyze the following key issues: a) how were the constitutional principles and values embodied in some criminal and criminal procedural norms of the new codes; b) the effects of Constitutional Court decisions in the process of constitutionalizing of the criminal law; c) applying into judicial activities of the Constitutional Court decisions, particularly those through which the new Criminal Code regulations were found unconstitutional.

Key Words: *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 comments on the principle of supremacy of Constitution

The supremacy of Constitution expresses the super-ordinated position of the fundamental law, both in the legal system and entire political social system of each country. In a narrow sense, the scientific supremacy of Constitution results from its form and content. The formal supremacy is expressed by the higher legal force, the derogating procedures in relation to the common law on constitutional norms' adoption and amendment, and the material supremacy results from the specific of the regulations, from their content, especially from the fact that through the constitution are set the organization, functioning prerequisites and the powers of public authorities.

In this regard, in the literature in specialty was stated that the principle of supremacy of the fundamental law "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 the power, converting the individual or collective wills into State wills; it gives authority to the governors, justifying their decisions and ensuring their implementation; it determines the functions and duties incumbent on public authorities, consecrating the fundamental rights and duties, it leads the

* Judge, Court of Appeal Piteşti; Lecturer Ph.D., University of Piteşti, Faculty of Law and Administrative Sciences; andreescu_marius@yahoo.com .

relations between citizens, between them and public authorities; it indicates the meaning or scope of state activity, meaning the political, ideological and moral values, under which signs, the political system is organized and functions; Constitution represents the fundamental background and the essential guarantee of the lawful order; it is, finally, the decisive benchmark for assessing the validity of all documents and legal facts. These are, however, substantial elements converging towards one and the same conclusion: *the material supremacy of Constitution*. But Constitution is supreme in the *formal* sense also. The procedure for adopting the Constitution exteriorizes a particular force, specific and inaccessible, which attaches to its provisions, so that no other law besides a constitutional one can abrogate or amend the provisions of the fundamental settlement, provisions that support each other, postulating their supremacy" (Deleanu, 2006: 221-222).

The concept of supremacy of Constitution cannot be reduced to a formal and material significance. Professor John Muraru stated that: "The supremacy of Constitution is a complex notion in whose content are contained the political and legal features and elements (values) expressing the super ordinated position of Constitution not only in the legal system, but in the entire socio-political system of the countries" (Muraru, Tănăsescu, 2009:18). So, the supremacy of Constitution represents a quality or feature that places the fundamental law on top of the political and legal institutions and expresses its super-ordinated position, both in the legal system, as in the entire political - social system.

The legal basis of the supremacy of Constitution is by the provisions of art. 1 paragraph 5 of the Basic Law: "In Romania, the observance of Constitution, of its supremacy and laws shall be mandatory". The supremacy of Constitution has not a purely theoretical dimension, in the sense that it could be considered simply a political, legal or possibly moral concept. Due to the express consecration of the fundamental law, this principle has a normative value, being from the formal point of view, a constitutional norm. The normative dimension of constitutional supremacy involves important legal obligations whose breaching may lead to legal sanctions. In other words, as a constitutional principle, normatively consecrated, the supremacy of the Basic Law is also a constitutional obligation with multiple legal, political, and value meanings, for all components of the social and state system. In this regard, Cristian Ionescu pointed out: "Strictly formally, the obligation (to respect the fundamental law supremacy) addresses to Romanian citizens. In reality, the observance of Constitution, including its laws, was an obligation entirely general, whose recipients were all law subjects - individuals and legal entities (national and international) in legal relationships, including diplomatic ones, with Romanian state" (Ionescu, 2015: 48).

The general meaning of this constitutional requirement relates to the compliance of the entire law with the norms of Constitution. By "law" we understand not only the component of the regulatory system, but also the complex, institutional activity for interpretation and application of the legal norms, starting with the fundamental law. "It was the intention of the Constituent Parliament derived on 2003

to score the decisive importance of the principle of supremacy of the Constitution over any other normative act. It gave a signal, in particular, publicly institutional with a governing role to strictly comply with the Constitution. The observance of Constitution is included in the general concept of legality, and the deadline for compliance with the supremacy of the Constitution requires a pyramidal hierarchy of the normative acts on whose top lie the Basic Law" (Ionescu, 2015: 48).

The compliance with this constitutional requirement and its realization, not only within the strict sphere of the legal system, but in the entire dialectic of movement and evolution of the social order and law, is the basis for what might be called the constitutionalizing of law, but also of the entire social system state organized. To support this assertion, we consider that, consistently in the literature in specialty, the principle of supremacy of Constitution is not restricted to its normative significance, and the Basic Law is regarded from its valuable perspective, with major implications for the whole social system. In this regard, Constitution is defined in the doctrine as "a fundamental political and social institution of state and society" (Muraru, Tănăsescu, 2013: 85-88).

Typically, the nonobservance of Constitution and its supremacy is manifested by adopting the normative acts contrary to constitutional principles and norms. The sphere of law does not reduce itself to the normative legal acts. Therefore, the Constitution and its supremacy may be violated by any legal acts of a public authority. Thus, the legal documents issued with the abuse of power, or those issued by nonobservance of the material competence constitutionally regulated are some of the ways in which public authorities can violate the requirement under Article 1 (5) of Constitution. The penalty applicable to legal acts regardless of their character contrary to the Constitution and its supremacy can only be nullity.

There is a guarantees system for respecting the supremacy of Constitution which, in our opinion, has two components. A specific guarantee and the most important is the control of constitutionality performed by the Constitutional Court. In this respect, the provisions of article 142, paragraph 1 provide on this regard: "The Constitutional Court is the guarantor for the supremacy of Constitution".

The other component of the system of guarantees is the general control of the application of Constitution made by the state authorities on the basis and within the material competence limits established by law. The judiciary control represents an important way to guarantee the fundamental law supremacy, because through the nature of the duties the law courts have, is interpreted and applied the law, which involves the obligation to analyze the compliance of the legal documents subjected to judicial reviewing with the norms of Constitution.

2. Constitutionality and constitutionalizing of some regulations in the Criminal Codes

The relationship between the Constitution and law, by "law" meaning the sphere of the normative acts legally inferior to the Basic Law, analyzed in accordance

with the requirements and consequences of the principle of supremacy of Constitution, reveals two dimensions:

The first one concerns the constitutionality of normative acts inferior, as legal force, to the Basic Law, and in a general sense, the constitutionality of the entire law. In essence, this requirement corresponds to one of the consequences of the supremacy of the Basic Law, namely the compliance of entire law with the constitutional norms. The realization of this constitutional requirement, a direct consequence of the principle of supremacy of the Basic Law, is primarily an attribute of infra-constitutional legislator in the work of drafting and adoption of normative acts. The fulfillment of the requirement of constitutionality of a normative act primarily involves the formal and material adequacy of the law to the Constitution's principles, values and reasons. The formal side of this report expresses the obligation of the legislator to respect the rules of substantive jurisdiction and legislative procedures, arising explicitly rules out of the norms of Constitution or other normative acts considered to be formal sources of the constitutional law. The formal compliance of the normative acts with the Basic Law requires a strict adequacy of the first ones to the norms and principles of Constitution, as there is no discretion or interpretation margin coming from the legislator.

The material dimension of this report is more complex and it relates to the compliance of the normative content of a law with the principles, values, norms, and also with the reasons of Constitution. Also this side of law's conformity with the constitutional norms is a constitutional obligation generated by the principle of supremacy of the Basic Law. The achievement of this obligation is an attribute mainly of the infra-constitutional legislator, that in the work of lawmaking is called to realize not only a simple legislative function, for adopting a normative act according to the Basic Law, but also a legal, political work, and we would also add, a values and scientific one, for the development and adoption of the law in accordance with the reasons, the normative content and principles of Constitution. In this way, in order to give efficiency to the principle of supremacy of the Basic Law, in the work of lawmaking the legislator must perform a complex task, interpreting the Constitution, which interpretation should not lead to circumvention of the meanings, significances and especially of the normative content of the constitutional norms. This complex process of adequacy of the normative content of a law to the constitutional norms, is no longer a strictly formal and procedural one, because it implies an appreciation margin specific to the work of interpretation made by the legislator and also it corresponds to the law-making freedom, which in case of the Parliament, is reflected in the very legal nature of this institutional forum defined in art. 61 paragraph 1 of the Basic Law: "The Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country". This is the expression of what in the literature in specialty is defined as the principle of parliamentary autonomy.

A second aspect for achieving the requirement of constitutionality of law, very important in my view, refers to the obligation of the infra-constitutional legislator to

implement and develop the normative acts drafted and adopted, according to their specificity, to the normative content, constitutional principles and values. We can say that in the activity for drafting the legal acts, understood as the main task of the Parliament and the Government, after Romania joined the European Union, in the work of law-making is very little present the concern of materializing constitutional principles and values, aspect that would give individuality to the normative elaborations, especially for the important areas of state activity and social and political life. As demonstrated by the legislative practice, and as unfortunately happened in case of the Criminal Code and Criminal Procedure Code recently adopted, most often one is looking for "models" in the legislation of other states or in the normative system of European Union law. Refusing to give effectiveness to the Romanian legal traditions, but also to the principles and values consecrated in the Basic Law, and not in the least, to the concrete social political realities of the state and society, very often the legislator, by adopting a complex normative act for important areas of activity, is initiating an eclectic, formal activity, with significant negative consequences on the work of interpretation and application of such normative act, especially in judicial activity.

We emphasize that the observance of the principle of supremacy of Constitution cannot be summarized only to the formal and material compliance of a law with the constitutional norms, bearing in mind that the supremacy has a qualitative, complex character, implying a values system to be found in the Basic Law rules. The observance of the principle of supremacy of the Basic Law in the work of lawmaking means primarily the originality of a normative act by its judicious adequacy to the social and state realities it governs, by taking over ideas and valuable traditions of the doctrine and jurisprudence, however all these are done by the transposition of the values and constitutional norms in the normative act developed. In this way, also the effectiveness of such a normative act is much higher, and the requirement of constitutionality becomes a much stronger quality of the law because, in our opinion, exceeding the formal and material criterion of compliance of law to the Basic Law norms, the constitutionality of a normative act means also its efficiency relative to the regulating object.

As we are trying to illustrate below, in the new penal codes there are quite a few omissions regarding the acceptance and implementation of the principles and norms of Romania Constitution and especially the inadequacy of the content of some legal norms with the Basic Law regulations, the latter issue being fully notified and censored by Constitutional Court. Unquestionably, checking the constitutionality of the law in relation to the achieving of adequacy of the formal and material requirements to the norms of Constitution is an exclusive attribute of the Constitutional Court, if the subject for the constitutionality control is the Parliament laws and Government ordinances. Under Article 142 paragraph 1 of the Basic Law, "The Constitutional Court is the guarantor for the supremacy of Constitution". Nevertheless, this fundamental institution of the lawful state is not the only one meant to contribute to guaranteeing of supremacy of the Basic Law. For other categories of

normative acts, one needs to recognize the jurisdiction of the courts to carry out such a constitutionality reviewing in accordance with the rules of jurisdiction and duties established by law (Andreescu, 2016: 211-226).

The *constitutionalizing* of the legal system, and in general of the law, is another reality of the implementation and observance of the principle of supremacy of the Basic Law, which in a narrow sense, can be understood as a complex activity, performed mainly by the Constitutional Court, and also by the law courts, within the limits established by law to interpret the enactment in force, in whole or in part, with reference to Constitution's rules, principles, values and reasons. In the procedural sense, the *constitutionalizing* of the legislation and law is the operation through which is refuted or confirmed the *constitutionality* of a juridical norm inferior to the constitutional norms and has as effect the location or, more accurately, relocation of the law within the values and normative framework of Constitution. The constitutionalizing of law is the result of constitutionality reviewing of the laws in force, conducted by the Romanian Constitutional Court on the way of exception of unconstitutionality, procedure regulated by the provisions of art. 146 letter d) of the Constitution and also by the subsequent provisions of Law no. 47/1992, republished, for the organization and functioning of the Constitutional Court[1].

More broadly, the constitutionalizing of law has a complex meaning, which is not restricted only to the reviewing of constitutionality, in fact is a permanent activity that expresses the dynamics of law in relation to the dynamics of the state system and social system. It is an ongoing work of adequacy of laws in respect to evolutionary, social and state reality, through a judicious interpretation and fructification of the constitutional rationales within the limits conferred by the normative content of the Basic Law. Without developing this aspect, we emphasize, however, the important role of the law courts in the complex work of constitutionalizing of the law through their specific attribute to interpret and apply the law, and also the constitutional norms, with the obligation to comply with the Constitution normative content, values and reasons. The literature in specialty asserts that through the role it has in the process of constitutionalizing of law, embodied in the procedural powers specific to the judgment act, the judge of the ordinary courts is in fact a constitutional judge.

The constitutionalizing of legislation and law is an evolutionary process determined not only by legal reasons, but also by the social, political and economic factors, outside the law. This dialectical process, considered concretely, with reference to a particular normative act, lasts as long as that law is in force. In some cases, the work of a normative act constitutionalizing may continue after it has been abrogated, in the assumption in which it ultra-activates.

The constitutionalizing of legislation and law, is primarily, the work of the Constitutional Court and judicial courts, but in a broader sense, all state institutional system in accordance with the jurisdiction norms contributes, by virtue of the interpretation and application of constitutional norms, to this complex process of

[1] Republished with its subsequent modifications updated, according to the no 183/2013, published in the Official Gazette, Part I, no. 369/20.06.2013

continuous approaching of the normative content of laws and other categories of laws, to the principles, values and reasoning of constitutional norms. It is obvious that the infra-constitutional legislator has a very important role in constitutionalizing of legislation and law, particularly by taking over in the normative acts developed and adopted, of what we call the reasons and values found in the normative content of the Basic Law.

Applying these considerations on the normative reality of the new criminal codes, we note that, within a relatively short time that has passed since their adoption, the Constitutional Court upheld many objections of unconstitutionality, noting the unconstitutionality of a significant number of norms in the Criminal Code and Criminal Procedure Code, fact that raises, in our view, three issues: the first one concerns the constitutionality of the work for enactment of the Parliament, which resulted in the adoption of the Criminal Codes. The question is how much the legislator respected the principle of supremacy of the law and its degree of concern to provide the material compliance of the rules of the Criminal Codes with the Constitutional norms. Given the large number of exceptions of unconstitutionality admitted, we appreciate that the concern of the legislator to respect the principle of the supremacy of the Basic Law in its most simple form, namely the compliance of the norms of the Criminal Code and the Criminal Procedure Code with the Basic Law of the country, was not a priority of the lawmaking process in this matter; the second problem envisages the concrete process of constitutionalizing of the criminal legislation through rulings of our constitutional court. We take into account both the decisions of the Constitutional Court, through which were rejected the exceptions of unconstitutionality regarding the norms of the criminal codes and through which, by the arguments brought, it contributes to the process of constitutionalizing of law, especially the decisions through which was declared the unconstitutionality of some legislative provisions. In the latter situation, it is also raised the issue of the legal effects of the Constitutional Court decisions, through which was declared the unconstitutionality of certain provisions of the two Criminal Codes. For the law courts that are called to apply the rules of the Criminal Codes, and also of the decisions of the Constitutional Court, the issue raised is very important, especially when quite frequent in Parliament or, where appropriate, the Government did not intervene, according to the Basic Law, to reconcile the normative provisions, declared unconstitutional, with the Constitutional Court decisions; A third issue concerns the reception by the infra-constitutional legislator, in developing the two criminal codes, of some normative constitutional provisions, principles and Basic Law rationale, important for the overall work of codification in criminal matters.

In this study we insist on the latter aspect, less discussed in the literature in specialty, which may not be subject to constitutionality reviewing of our constitutional courts, because it functions as a "negative legislator" and therefore cannot sanction the eventual omissions of the infra-constitutional legislator to take over in the law elaborated and adopted, aspects of the normative content of the Constitution. We have in mind particularly the constitutional principles upon which

the entire Criminal Codes normative system is structured.

The legislator has shown no special interest to consecrate in the Criminal Code and Criminal Procedure Code the general principles of law, particularly those whose origin is formed by the constitutional rules, by which to confer a systemic and explanatory cohesion to the entire regulatory content of the codes and to which can relate the one interpreting the criminal law.

We believe that the normative expression in the two Criminal Codes of some general principles of law, which, by their nature, are constitutional principles, would have resulted in a high constitutionality level for the two normative laws through a better alignment of their normative content with the Basic Law norms. This high level of constitutionality would have resulted in the functional codes stability to avoid declaring the unconstitutionality of some important legal norms, as happened so far.

The importance of the principles of cohesion and harmony of the whole legal system was analyzed and highlighted in the literature in specialty (Craiovan, 1998; Mihai, Motica, 1997; Popa, 1999; Dabin, 1953; Andreescu, 2016). The law principles confer a values legitimacy and consistency to the rules contained within the law's content. In this regard, Mircea Djuvara remarked: "The whole science of law doesn't consist in reality, at a serious and methodical research, in anything else than in releasing out of the many provisions of law, of their essentials, meaning those ultimate principles of justice, out of which all other provisions derive from. Thus, all legislation becomes of a great clarity and thus is caught what is called legal spirit. Only then is the scientific development of a law done" (Djuvara, 1999: 265). Equally significant are the words of the great philosopher Immanuel Kant: "It's an old wish that, who knows when? shall it fulfill: to discover instead of the infinite variety of civil laws, their principles, as only in this lies the secret to simplify, as it is said, the legislation"(Kant, 2008: 276-277).

In terms of normative aspect, the source of principles of any legal branch and, especially of a code, must firstly be the constitutional norms which, by their nature, include rules for maximum generality, constituted as the background, but also the source of legitimacy for all other legal norms.

The Criminal Code does not have a title designed for the general principles applicable in this field, and in the Criminal Procedure Code. Title I governs both the aspects related to the principles and also the limits for applying the Criminal Procedure law. We appreciate that this legislative technique is deficient because it does not clearly and distinctly individualizes the general rules of Criminal Procedure considered to be principles of normative value. The normative solution of the lawmaker, found in the Criminal Code, is even more deficient in relation to that applied in the Criminal Procedure Code. In the normative content of chapter I, with marginal title "General Principles" of Title I, with the marginal title "Criminal law and its limits of application", in fact is normatively regulated one principle, namely "The legality of criminalization and of criminal law sanctions ". Chapter II of Title I of the Criminal Code is devoted to the criminal law enforcement in time. For the reasons outlined above, I think that would have been more useful, particularly for a

coherent systematization of the regulatory provisions and constitutional legitimacy of the Criminal Code, including the correct interpretation and application of criminal provisions, the explicit normative expressing of the constitutional principle of law activity, consecrated in article 15 paragraph 2 of Constitution, accompanied by the regulation of the particular aspects specific to Criminal Law in Title I of Chapter I of the Criminal Code.

There are other principles consecrated in the Constitution, which, in our opinion, ought to find concrete normative expression in the Criminal Code and the Code of Criminal Procedure. The ultimate goal of the entire criminal legislation, but also of criminal proceedings is to guarantee the fundamental human rights and freedoms, considered to be a basic component of the social and law order, considered an important requirement of the lawful state. As highlighted consistently in the literature in specialty, the principle for respecting the human dignity is the essence of the fundamental rights and freedoms and, simultaneously, the purpose for their guaranteeing under the law, but also through the institutional – procedural means and mechanisms.

Human dignity is a constitutional principle consecrated explicitly in article 1 paragraph 3 of Constitution, being considered as defining for the lawful state. The recognition as principle and constitutional value of human dignity results in the legal obligation of state authorities, including the judiciary ones, to respect human dignity, to refrain from any actions or measures likely to harm human personality, both in its biological, spiritual, rational or moral size and also the positive obligation to apply the measures necessary to comply with this important dimension of the human existence values. This is especially important in Criminal Proceedings and, generally, for the entire criminal legislation, that regulates and involves the application of restrictive and coercive measures specific to the criminal investigation through which may be restricted, limited or imposed in principal, main values such as individual freedom, possession and ownership. According to the principle for respecting the human dignity, any restricting and coercive measures of criminal nature cannot affect the existential elements of human person, through which the human quality itself is defined. We have into consideration both the biological dimension, and the spiritual, rational and moral dimension of man.

The essence of this obligation, which can be translated into legal norms and formula, to guarantee not to harm in any circumstances, human dignity, this concept, in its ontological significance, being the equivalent to the notion of human person, is at the same time a maximum of the practical reason, referred to by Immanuel Kant: "Man must always be considered as purpose and never as a means" (Kant, 2008: 141-144). Without trying to develop in detail the theoretical aspects of the human dignity concept in this study, we underline the fact that the compliance of this core value should be one of the most important requirements to be found through an explicit normative consecration in the criminal law. In this regard, for example, we mention that judicial individualization of punishments should have as ultimate reason the respect for human dignity, in its general significance, through everything that means

human complex biological, rational and moral dimension, considered as a person, and not as a simple element (individual) in the social-relational system.

The legislator didn't consecrate human dignity as principle in the Criminal Code, nor did he establish the obligation to comply with this value. We appreciate that this legislative omission is a minus of constitutionality of the Criminal Code, as the due efficiency was not given to the supremacy of the Basic Law, which, among other things, imposes the obligation for the legislator to take into consideration the principle of human dignity as a fundamental value of the material criminal law. The need for such a normative consecration results from the criminal liability nature itself, focusing particularly on matters of legal constraint: the establishment and enforcement of criminal penalties, sanctions, regulation of punishment regime enforcement. All these institutions cannot, under any circumstances, affect the values that form the specific dimensions of human dignity.

Unlike the Criminal Code, in the normative content of the Criminal Procedure Code this principle is consecrated in article 11 with the marginal title "Respecting the human dignity and privacy". We note in this case that, for a correct systematization of the rules of Criminal Procedure code, this principle should be devoted in a special title dedicated to general principles of Criminal Proceedings. The principle of respect for human dignity, even in normative consecration case, as applicable for the Code of Criminal Procedure, has a value almost exclusively theoretical and formal, because the procedural sanctions are not regulated for failure to comply with it during the trial.

The provisions of article 1 paragraph 3 of Constitution concerning the characters of the Romanian state, lists, among others, as an essential component of the lawful, democratic and social state, the consecration of citizens' civil rights and freedoms as supreme values, understood by reference to the democratic traditions of Romanian people and the ideals of December 1989 Revolution. According to the same constitutional norms, are guaranteed the citizens' rights and freedoms, as supreme values of lawful state.

In relation to these constitutional provisions, we consider that the principle of guarantee and respect for rights and freedoms, especially where their exercise may be subjected to some conditions, limitations or restrictions, is essential for the material criminal law, and criminal proceedings. For the reasons outlined above, we believe it would be helpful if, in a chapter dedicated specifically and exclusively to the general principles of criminal law and criminal proceeding of the new Criminal Code, the legislator would have expressly regulated the principle according to which the respect and guarantee of the rights and freedoms of citizens is an obligation of the judicial authorities in criminal law enforcement. It would be useful, with the assumption of such legislation, to stipulate sanctions for non-compliance by the judicial authorities of the subjective rights and freedoms and, above all, of the fundamental constitutional rights. Nonobservance in the judicial proceedings of the fundamental rights and freedoms would be an abuse of power by state authorities, and the applicable sanction in this case can only be but the absolute nullity of any procedural act or procedure

that would affect unduly these rights.

The constitutional principle of equal rights and the non-discrimination principle, consecrated by the provisions of article 16 paragraph 1 and respectively article 4 paragraph 2 of the Constitution, have not been taken over and accordingly consecrated normatively as principles specific to the criminal law and criminal procedure in the two criminal codes. No need to emphasize the importance of the two constitutional principles, particularly for the Criminal Proceeding and the need for their normative consecration both in the Criminal Code and in the Criminal Procedure Code, making use of the doctrine and jurisprudence on the matter. As an example, we have into consideration a private aspect of the principle of equality, respectively what in the doctrine and jurisprudence is called "equality of arms", an element essential to the proper conduct of the criminal trial.

The principle of proportionality is explicitly or implicitly consecrated by the constitutional norms. In its explicit form, the provisions of article 53 of Romania Constitution, consecrates it as a condition if restricting the exercise of certain rights. We note, however, that proportionality is a general principle of internal law, but also a fundamental principle of EU law. The most important procedural dimension of this principle refers to the idea of correspondence, the fair adequacy of a state decision to the situation in fact and the legitimate aim pursued. The compliance with this principle confers not only the legality of state authorities' measures, but also legitimacy, materializing in this way also the values dimension of State action with specific reference to core values such as: justice, fair extent, fairness, and respect for diversity of situation in fact within the generality of the legal norm, in other words proportionality is the principle through which the general and impersonal normative regulation is materialized (Apostol Tofan, 1999; Andreescu, 2007).

The space dedicated to this study does not allow us to go into details, however we consider illustrative the statement of Professor Ion Deleanu on this principle: "Briefly, the putting into application of proportionality – contextualized and circumstantial – involves shifting from rule to Meta – rule, from normativity to normality, from hypostasis before the legal rule to the discovery and appreciation of its meaning and purpose. The reference criterions in such reasoning are, above all, the ideals and values of a democratic society, considered by convention (European Convention for the Human Rights and Fundamental Freedoms' Protection) and, actually, the only one compatible with it (Deleanu, 2008: 367).

The purpose of applying this principle into the criminal proceedings is avoiding, and we would say, the sanctioning of the excess power coming from the judicial authorities. In the criminal institutions where the principle of proportionality must have a common application, this will lead to the individualization of criminal sanctions and preventive measures applying. This principle is not consecrated as a general principle nor in the Criminal Code or in the Criminal Procedure Code, as would have been natural, in our opinion, having in consideration the constitutional dimension of proportionality. However, there are regulations that implicitly or explicitly evoke proportionality. For example, the provisions of article 202 paragraph

3 of Criminal Procedure Code refer to proportionality as the general condition of choice and implementation of preventive measures. Instead, the provisions of article 74 of the Criminal Code, governing the general criteria of individualization of punishments, do not refer explicitly to the requirement of proportionality. However, implementing such a requirement would result from the systematic interpretation of the general criteria of individuation to which this text of law refers to.

For the reasons outlined above, we consider as necessary, under the principle of supremacy of Constitution, the explicit, normative consecration of the principle of proportionality as a general principle, both in the Criminal Code and the Criminal Procedure Code. In this way, it would have made a systematic embodiment of the procedural aspects of the principle in relation to the two penal institutions to which I referred above.

The provisions of article 53 of the Basic Law, having the marginal name "Restriction of certain rights exercising", establish an important guarantee in case of application of certain measures to be considered as limitations or restrictions or conditions, and which are concerning the subjective rights and particularly, the fundamental constitutional rights. The constitutional norm establishes the fundamental guarantee, according to which any restrictive measure aiming a subjective right *can only apply to its exercising and cannot affect the very substance of the right*. In our opinion, this constitutional requirement implemented in the Criminal Law is an important guarantee for respecting the subjective rights and particularly of fundamental human rights, especially where, through coercive measures, their exercise may be restricted, conditional or limited.

Neither of the two Criminal Codes does take this normative constitutional requirement. We appreciate that it would be useful, given the reasons outlined above, that in a social chapter, devoted to general principles of Criminal Procedure, to be expressly stipulated that *"any preventive measure should not affect the substance of the subjective right, thus it may only aim the exercising of the right."* Practically, it is an important guarantee of the subjective rights and freedoms, in which case, through prevention measures, their exercising is restricted or limited. Specifically, it creates an essential criterion for assessing the reasonableness of the preventive measures' lasting.

In a few brief considerations we intend also to refer to another aspect regarding the constitutionality of the new Criminal Code, namely the possible inconsistencies between the norms of the Constitution and provisions of the Criminal Code, aspects that were not currently being analyzed by the Constitutional Court or the doctrine of specialty.

The provisions of article 23 of the Basic Law consecrate the right to individual freedom and list the preventive measures that can bring limitation to the exercising of this right. Under the provisions of article 23 paragraphs 3 and 4, these preventive measures are: detaining and preventing arrest.

The Criminal Procedure Code, in Title V, Chapter I, regulates other three preventive measures not covered by the constitutional text. It is house arrest, judicial

control and judicial control on bail. The question arises whether there are legal consequences of this regulatory difference between the Constitution and the special law, given that, by its content, art. 23 of the Basic Law, is an analytic, descriptive one, the purpose of the constitutional legislator being to ensure by the legal force itself of the Constitution, the fundamental right to personal liberty. In our opinion, there isn't an unconstitutionality issue by the fact that the three preventive measures covered by the Code of Criminal Procedure are not mentioned in the constitutional text. We believe that the enumeration made in art. 23 of the Constitution, regarding preventive measures has an enumerating character, not exhaustive. Therefore, the special law may regulate other preventive measures, the condition being to respect the constitutional reasons, as shown in the above-mentioned regulations, on guaranteeing the individual freedom.

Constitutional Court's jurisprudence in this matter confirms such a doctrinal interpretation. By Decision no. 740/11.03.2015 [2] was admitted the exception of unconstitutionality and found that the provisions of art. 222 par. 10 of the Criminal Procedure Code, according to which "the duration of deprivation of liberty ordered by house arrest is not taken into account in calculating the maximum duration of preventive arrest of the culprit during criminal investigations", are unconstitutional. For our analysis we are interested on the considerations for which the Constitutional Court has ruled to this effect: "The Court finds that article 23 paragraph 5 of the Constitution refers only to the maximum duration of preventive detention, which is fully justified chronologically, given that house arrest was governed by the provisions of Law no. 135/2010 on a date later to constitutional revision and that on the date of the Basic Law revision the only deprivation of liberty preventative measure, besides the detaining, was the preventive detention. The Court notes, however, that the constitutional norm analyzed should be interpreted broadly, as limiting during the prosecution to 180 days the maximum length of detention, irrespective it's about the preventive arrest or arrest at home (...). In conclusion, the Court finds that the constituent legislator had in mind, on the occasion of regulation of article 23 paragraph 5 of the Basic Law, the limiting of any deprivation of liberty, except for the detaining, that benefits of a separate regulation by paragraph 3 of the same article, 23 to 180 days. Allowing, by cumulating the periods of the two custodial preventive measures to exceed a maximum of 180 days, means to defeat the constitutional norm requirements specified in Article 23 paragraph 5".

Some aspects of unconstitutionality may also address to the current regulation regarding the safety measures of special confiscation. The provisions of article 112, respectively article 112/1 of the Criminal Code, govern the special confiscation and extended confiscation. We consider that these legal provisions could prejudice the provisions of article 44 paragraph 8 of the Constitution, which consecrates the presumption of the illegal nature of acquisition of the goods and property, because they allow confiscation of assets belonging to persons who are not parties to the

[2] Published in the Official Gazette, Part I., no. 927 on December 15th, 2015.

criminal trial and do not participate in legal relations of criminal law. The regulations above-shown in our opinion, are unconstitutional also because of the wording of legal norms, meaning that they have not the clarity and the precision due for their correct interpretation and application.

3. Some conclusions on the effects of Constitutional Court decisions in the criminal trial

One last aspect that we want to analyze briefly in this study relates to the effects of decisions of the Constitutional Court through which it has been declared the unconstitutionality of certain provisions of the Criminal Code or Criminal Procedure Code. In accordance with article 147 paragraph 4 of Constitution, the Constitutional Court decisions are binding and effective only for the future. However, under the provisions of article 147 paragraph 1 of the Basic Law, the provisions of laws and ordinances in force declared as unconstitutional cease their legal effects within 45 days of publication of the Constitutional Court decision. During this time, the Parliament or the Government, where applicable, is obliged to reconcile the unconstitutional provisions with the Constitution provisions. During this period, the provisions declared as unconstitutional are lawfully suspended (Muraru, Tănăsescu, 2008: 1418-1424; Andreescu, Puran, 2015: 286-289; Iancu, 2008: 386-387).

It has a practical interest especially the situation when the legislator has not intervened to reconcile the normative provisions of the Criminal Code declared unconstitutional with the Constitutional norms. There are several such situations when norms of the Criminal Code and Criminal Procedure Code were declared unconstitutional without the legislator to intervene within the meaning of art. 148. 1 of the Basic Law. As an example we consider the provisions of article 301 paragraph 1 and article 308 paragraph 1 of the Criminal Code whose unconstitutionality has been found by Decision No. 603/6 October 2015[3]; provisions of article 335 paragraph 4 of the Criminal Procedure Code[4] and the provisions of article 347 paragraph 1 of the Code of Criminal Procedure[5]. We have in consideration also the Decision no. 423/9 June 2015[6] by which was declared the unconstitutionality of the provisions of article 488/4 paragraph 5 of the Criminal Procedure Code.

For the judge called upon the applying of the provisions of Code of Criminal and Criminal Procedure Code this situation may have a different solution depending on concrete aspects retained by the Constitutional Court for which the text of the law in question was found to be contrary to the Basic Law norms. In this sense, we can distinguish between the interpretative decisions of the Constitutional Court, clarifying

[3] Published in the Official Gazette, Part I, no. 845/13 November 2015.
[4] Ascertained as unconstitutional by Decision no. 496/23 June 2015 of the Constitutional Court, Published in the Official Gazette, Part I, no. 708/29 November 2015.
[5] Ascertained as unconstitutional by Decision no. 631/8 October 2015 of the Constitutional Court published in the Official Gazette, Part I, no. 831/6 November 2015.
[6] Published in the Official Gazette, Part I , no. 538/20 July 2015.

the constitutional reasons of the text analyzed, on the other hand the decisions of the Constitutional Court through which the legal norm is removed as contrary by its content to the relative norms of Constitution. In the first case, the judge applies the criminal norm or the criminal proceeding norm in the meaning or reasons given by the Constitutional Court. In the second scenario, in the absence of intervention of the legislator, the norm found to be unconstitutional cannot be applied.

The passivity of legislator to reconcile norms held as unconstitutional with the correlative provisions of the Basic Law may have serious consequences for the purposes of criminal proceedings. In practice, in order to avoid such situations, especially in the assumption when for the regulations contained in the Criminal Procedure Code, contrary to the principle of publicity of the hearing or participation of the parties and prosecutor, the courts have proceeded to application of the general rules, primarily the constitutional ones, that consecrate the principle of publicity of the hearing (art. 27 of the Constitution); and the principle of equality, including in its particular form of equality of arms, as is clear from the provisions of art. 16 in conjunction with article 124 of the Constitution. We appreciate that this solution is fair, because in a criminal trial the judge has the possibility and even the duty to apply directly the constitutional principles and norms when the legislator failed to fulfill its obligation under Art. 147 paragraph 1 of the Constitution, or even under the assumption that he applies and interprets a criminal norm or a criminal proceeding norm.

We consider as necessary the intervention of the legislator to eliminate these deficiencies and share a high degree of constitutionality to the Penal Code and Criminal Procedure Code.

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