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Ph.D. Thesis

# CONSTITUTIONALIZATION OF CRIMINAL LAW IN ROMANIA

## SUMMARY

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# I. General aspects regarding the fundamental research

## 1. The actuality of the subject

In France, the concept of constitutionalization ofvarious branches of law was first described at the first meeting of the French Association of Constitutionalists in February, 1980, at the Saint-Maur Law School and represented a special interest for the members of the association, as well as a challenge for many of them, for whom the concept of costitutionalization was an utopia, if not a fantasy. This description was however based on two previously published studies of Favoreu[1]. A year later, the president of the association, François Luchaire, also addressed the issue of the constitutionalization of the branches of law, in the French report presented at the International Colloquium in Aix-en-Provence of February, 1981[2], published in the International Journal of Comparative Law No.2 of 1981[3].Later, he also published in the Quarterly Journal of Civil Law from April-June, 1982 a very long and substantial study on the „*constitutional foundations of civil law*".

In the Romanian published literature, the emergence of the phenomenon of the constitutionalization of the branches of law is considered a consequence of the adoption of the 1991 Constitution which *„meant a moment of crossroads and had the role of triggering a fast process of penetration of the principles promoted by the Constitution both in the national law and further in the practice of judicial bodies and those of the public administration*"[4].

However, the theme and the problem of constitutionalization of the law in Romania could not have been studied without the help of the comparative law, considering that the phenomenon of the constitutionalization of the branches of law characterizes any legal order built on the principles of the state of law and on the action of the constitutional courts.

This doctoral thesis presents, according to the undersigned, an interest from the following point of view: first, I have subjected to a critical examination the practice of the national constitutional court in criminal matters, from the moments of its establishment and until September 1st, 2019, in order to establish the magnitude of constitutionalization of criminal law as a result of the spread of constitutional principles at the level of criminal law branch, such as: principle of equality before the law, the principle of non-retroactivity of the

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[1] L. Favoreu, *L`apport du Conseil constitutionnel au droit public*, Pouvoirs, 1980, No.13; *L`influence de la jurisprudence du Conseil constitutionnel sur les diverses branches du droit, Mélanges Léo Hamon*, pp.235-245.
[2] *Cours constitutionnelles européennes et droits fondamentaux*, Paris,Economica et Presses universitaires d`Aix-Marseille Publishing, 1982, p.55.
[3] Pp.300-309.
[4] I.Filipescu, V.Zlătescu, *Dreptul civil constituţional român,* in„Dreptul"JournalNo.3/1994, p.45.

criminal law, the principle of retroactivity of the more favorable law, the presumption of innocence, analyzing in which way they have been transposed into strict rules governing criminal law.

Also, I brought to attention the way in which certain fundamental rights are protected by the constitutionality control of the criminal rules realized by the Constitutional Court of Romania, such as the right to a fair trial, the right to solve cases within a reasonable time, the right to defense, by analyzing the most relevant constitutional case files.

Secondly, I made a statistical highlight, in percentages, of the institutions or fields in criminal matter subject to the constitutionality control, as well as an analysis of the effects of the process of constitutionalization of criminal law branch in Romania, analyzed on three levels: in legislative plan, law practice plan and published literature plan.

## 2. Purpose and objectives of the research

This topic was approached gradually, starting from the evolution and consequences of the constitutionalization process in general, with the study of the mechanism of this process and of the effects it produces at the level of the entire legal system, in order to subsequently follow the particularization of this process within the branch of criminal law, with the study of the specific effects produced within it.

The sources used for documenting were the relevant regulations in this matter, adopted both at national level, but also at European Union level, Romanian and foreign published literature, Romanian Constitutional Court law practice, ECHR law practice, Constitutions of other states, official websites of different institutions and authorities.

The objectives pursued by this addressed topic are intended to facilitate finding the answer to the following questions:

- What were the consequences of adopting the 1991 Constitution and subsequently its revision in 2003, on the 1969 Criminal Code and the 1968 Criminal Procedure Code?
- To what extent did the spread of constitutional principles in the field of criminal law take place?
- What role did the decisions of the Constitutional Court of Romania in adopting Law No.15/1968 on the Criminal Code and Law No.29/1968 on the Criminal Procedure Code and how the Constitutional Court is currently contributing to the achievement of a constitutional justice within the branch of criminal law?

- What are the effects of constitutionalizing the branch of criminal law on the three levels: legislative, law practice and published literature?

## 3. The research methodology used

In relation to the purpose and objectives proposed, it was necessary to use several quantitative and qualitative research methods, among which are: the historical method, the logical method, the deductive-inductive method, the critical-comparative method and the statistical method.

The historical research method was applied in order to present the evolution of some fundamental notions for this research, such as Constitution, constitutionalism and constitutionalization, as well as some constitutional principles that direct today the progress of the Romanian, but also European criminal law, such as: the principle of legality, the principle of equality before the law, the principle of non-retroactivity of the criminal law, the principle of retroactivity of the more favorable law, the presumption of innocence or of fundamental rights such as: the right to defense, the right to settle the cases within a reasonable time, the right to a fair trial.

The deductive-inductive method was used for the deconstruction and reconstruction of the constitutionalization process at the level of the entire law system (general level), in order to apply it to the criminal law branch.

The logical method sought to synthesize the opinions of several authors on certain notions and principles, such as: the rule of law, the principle of separation of the powers in the state, the principle of legality, the principle of equality before the law, the principle of non-retroactivity of the criminal law, the principle of the retroactivity of the most favorable law, the presumption of innocence, the right to a fair trial and the right to defense, so that in the end, the common elements of the opinions expressed can be detached and express a personal point of view regarding the legal definitions, legal concepts or structural elements of some institutions used in this research.

The critical-comparative method was intended to provide an overview of how the role of constitutional courts and the decisions they give is reflected in the constitutional order of European states, even if they are Constitutional Courts or Constitutional Jurisdiction. Also, a comparison of the European constitutional systems with the American model in terms of the way in which the control of legality of the laws is carried out and by which authority was

wanted, with underling the advantages and disadvantages of each system of control of constitutionality.

The statistical method was used to process the data obtained as a result of analyzing the entire law practice in criminal matters of the Constitutional Court of Romania, from the moment of its establishment until September 1st, 2019, with the purpose of statistically highlighting, in percentages, the institutions or the areas subject to the constitutionality control, as well as the effects of this control in the legislative, law practice and published literature plan. Also based on the statistical method, it was established which of the two control modalities performed by the Constitutional Court of Romania – *a priori* or *a posteriori* – was the most commonly encountered in criminal matters in the case law of the Court, analyzing the effects of each type of control used by the constitutional court.

Each of these research methods has been applied either individually to identify certain intermediate results pursued, or combined with each other in order to unveil the final results of the research.

## II. The content of the thesis

### 1. The structure of the doctoral thesis

This thesis is structured on three titles, which in turn include chapters, sections and subsections, for easier identification and reading of the analyzed problems, to which are added the final considerations. If Title I is dedicated in its entirety to the process of constitutionalization of law in general, Titles II and III focus on the constitutionalization of the branch of criminal law and the effects produced as a result of this process.

In the first chapter of Title I, I defined and differentiated, from the perspective of constitutional law, three legal notions, with which I operated during the research: Constitution, constitutionalism and constitutionalization.

The second chapter of Title I deals with the premises of the appearance of the process of constitutionalization of the law, being studied both the special political premises as the separation of powers in the state and the principle of the rule of law, as well as the legal premises regarding: the existence of a Fundamental Law, the supremacy of the Constitution and the affirmation of the principle of constitutionality, the direct application of constitutional regulations.

In the third chapter of the first Title, the analyzed theme is represented by the factors of the constitutionalization of the law in general, starting from the existence of a constitutional justice, with the presentation of the European and American model of controlling the constitutionality of the laws. Regarding each model of constitutional justice, the specific characteristics or elements of identification are mentioned, in order to establish the advantages and disadvantages of the two models presented. We mention that we have chosen to use the notion of constitutional justice and not of constitutional jurisdiction or constitutional litigation, since we consider that it best highlights the activity carried out by the constitutional court, which, even if it is a non-contentious procedure, by the decisions it pronounces, it divides the rules of law or the laws and ordinances in their entirety, into constitutional or unconstitutional, so that, on one hand, their addressees know what position they take in relation to them, and on the other hand, the issuer, what obligations they have as a result of finding their constitutionality.

At the end of this chapter, the Constitutional Court of Romania is presented as an innovation enshrined in the 1991 Constitution because in the system of the 1923 Constitution the control of the constitutionality of the laws was entrusted to a judicial body, namely to the High Court of Justice. After establishing the legal nature of the constitutional court, only two of the attributions of the Constitutional Court are analyzed, namely those provided in article 146 paragraph 1 letters a and d of the Romanian Constitution, since it was considered that only these are of importance for the studied subject. A separate subsection was dedicated to the acts of the Constitutional Court, their binding nature and the effects produced by the decisions of the constitutional court. It was tried on the occasion of presenting the categories of decisions, clarifying the concept of decision with reservation of interpretation, a somewhat difficult step, since it is obvious that the majority of the decisions given by the Constitutional Court of Romania are included in the simple or extreme decisions, which may be of admission, of rejection of the constitutional objection or of objection brought to the attention of the constitutional court.

The last chapter of Title I focuses on the presentation of the direct and indirect consequences of the constitutionalization of the law. In the category of direct consequences are included: the general obligation of the whole society to respect the Constitution, the annulment of legal regulation contrary to the Constitution and the interpretation of legal regulations in accordance with the constitutional regulations. Within this chapter the competence of the Constitutional Court of Romanian vis-à-vis the HighCourt of Justice was also delimited, as well as in relation to the legislative power, considering that, on one hand, in

Romania the constitutional court was not invested with the power to interpret the Constitutional compulsorily, irrespective of the settlement of a case brought to trial, such as in the Russian Federation, Hungary, Slovakia, Bulgaria, and on the other hand, article 147 paragraph 2 of the Constitution does not justify the Constitutional Court to give indications to the legislative power as namely to agree the regulations, and even less how to replace it, being only a negative legislator, who identifies the unconstitutional legal regulations within the limits established by article 146 of the Constitution.

In the category of indirect consequences, the modernization, unification and simplification of the legal order were analyzed.

Title II of the thesis entitled ”The process of constitutionalization of criminal law” begins in the first chapter with the definition of the concept of criminal law and its place in the hierarchy of legal regulations.

The second chapter of Title II analyzes the extent of the phenomenon of constitutionalization of criminal law as a result of the spread of constitutional principles at the level of criminal law and of the protection of fundamental right through the constitutionality control of the criminal regulations. Thus, initially the principles of constitutional order directing the progress of Romanian, will be brought into question, but also the European criminal law, such as: the principle of legality, the principle of equality before the law, the principle of non-retroactivity of the criminal law, the principle of the retroactivity of the more favorable law, the presumption of innocence, analyzing the extent to which they were transposed into strict rules governing criminal law. Each principle is analyzed as a concept, according to its regulation in the Romanian Constitution, in the international regulations to which Romania is a party also in criminal law. A separate subsection is allocated in the study of each principle for the analysis of the relevant constitutional law practice in that matter. There are presented and analyzed the decisions of the Constitutional Court of Romania that had as object the solution of some exception of unconstitutionality of some provisions both of the 1969 Criminal Code and of the 1969 Criminal Procedure Code, as well as Law No.15/1968 on the Criminal Code and the Law No.29/1968 on the Criminal Procedure Code.

Subsequently, it is brought into attention the way in which certain fundamental rights are protected by the constitutionality control of the criminal regulations realized by the Constitutional Court of Romania, such as the right to a fair trial, the right to solve cases within a reasonable time, the right to defense, by analyzing the most relevant constitutional law practice in the matter. And in their case, a distinct subsection is allocated within the study of each fundamental right to analyze the relevant constitutional law practice in the matter,

being presented and analyzed the decisions of the Constitutional Court of Romania that had as object the solution of some exception of unconstitutionality of some provisions both of the 1969 Criminal Code and of the 1968 Criminal Procedure Code, as well as Law No.15/1968 on the Criminal Code and the Law No.29/1968 on the Criminal Procedure Code

Title III of the thesis, entitled, "The effects of the constitutionalization of criminal law" is divided into three chapters and aims at the statistical highlighting, in percentages, of the institutions or areas subject to the constitutionality control, as well as the effects of carrying out this control in the legislative, law practice and published literature plan.

On the legislative level, one of the main effects of the constitutionalization of criminal law, as a result of exercising the *a priori* constitutionality control, is that it stimulated the legislator to increase the quality of its creative act in criminal matters and at the same time stimulates the publication of criminal regulations in accordance with the Fundamental Law and impregnated values and principles. Even if the control prior to the promulgation of the law is essentially an abstract control, outside any dispute related to the application of the law and the settlement of the complaint of unconstitutionality is made on the basis of the referral document and the investigations of the Constitutional Court, not having the complex character of the procedure for solving unconstitutional exception[5], we cannot deny its importance in the elaboration of the regulations in general.

In the *a priori* control, the Constitutional Court also has the possibility to resort to the mechanism of interpretation decisions, namely to render decisions of conformity of the criminal law subject to a certain interpretation, by which facilitates the application of the criminal law, in the sense that it can be promulgated and will enter into force, producing its effects, but in the sense specified after the constitutionality control. This avoids the legislative process which involves time and resources, sometimes the entry into force of the law being vital for the socio-political and economic life. This process strengthens the awareness of other authorities regarding the necessity of a criminal law or criminal procedure law in force which, in its content, is in accordance with the Constitution. The Constitutional Court considers that it has the possibility to make decisions on the path of *a priori* constitutionality control by describing in more detail the forms of interpretation of the Constitution, so as to provide an efficient and professional guidance to the Parliament.

However, in Romanian criminal law, the exception of unconstitutionality constituted the essential means in carrying out the constitutionalization process. If since September, 1992

[5] B.Selejan-Guțan, *Excepția de neconstituționalitate*, All Beck Publishing, Bucharest, 2005, p.78.

to September, 2019, only 14 admissions decisions were made in criminal matters by way of *a priori* control, the situation is different regarding the decisions given by *a posteriori* control, 147 exceptions of unconstitutionality beingadmitted by the Constitutional Court of Romania.

There was also a grouping of admission decisions according to the sphere of institutions of criminal law and criminal procedure law, whose regulations were subjected to the subsequent constitutionality control as follows:

- Institutions of criminal law and criminal procedure law, whose regulations have been subject to subsequent constitutionality control after February 1st, 2014 and until September, 2019
- Institutions of criminal law and criminal procedure law, whose regulations have been subject to subsequent constitutionality control, from the moment of the establishment of the Constitutional Court of Romania and until February 1st, 2014.

It was used in this delimitation February 1st, 2014, this being the date of repealing the old codes – criminal and criminal procedure – and the entry into force of the new ones, since both Law No.135/2010 *on the Criminal Procedure Code* and Law No.289/2009 *on the Criminal Code* contains new or redefined institutions, compared to the 1969 Criminal Code and the previous Criminal Procedure Code. For each grouping, a statistical highlight was made, in percentages, of the institutions or areas subject to the constitutionality control.

A first aspect, which could be observed following the analysis of the two graphs, was the preponderance of the admission decisions made by the Constitutional Court of Romania in the matter of preventive measures, both in the current regulation of the Criminal Procedure Code and in the old regulations. This can be explained by the high importance given to the right to individual freedom, provided in article 23 of the Constitution, which concerns the physical freedom of the person, the right to behave and move freely, not to be held in slavery, arrested or detained, except in the cases and according to the forms expressly provided by the Constitution and the laws. From a constitutional point of view, it is not interested in how many preventive arrest warrants are issued against a person and whether they are issued in the same case or in different cases, but if the arrest measure was taken ”*only in the cases and with the procedure provided by the law*”, as imperatively provides article 23 paragraph 2 of the Constitution.[6]On the other hand, given that individual freedom is indivisible, it is obvious that, no matter how many arrest warrants would be issued against a person for committing the offenses for which he or she is accused, the duration of the preventive arrest measure cannot

[6]Constitutional Court DecisionNo. 567 ofDecember 27, 2005, Official JournalNo. 1047 ofNovember 24, 2005.

exceed the terms provided by article 23 depending on the time when it is ordered: during the criminal prosecution or during the trial phase.

If, in the regulations of the Criminal Procedure Code, prior to February 1st, 2014, we find only exceptions of unconstitutionality admitted in the matter of the preventive measures that concerned only the measure of preventive arrest, in the new regulation of the Criminal Procedure Code we find exceptions of unconstitutionality admitted and regarding other preventive measures, such as judicial control, judicial control or bail. The arrest at home, although it is a preventive measure introduced by the Law No.135/2010 on the Criminal Procedure Code, was also subjected to *a posteriori* constitutionality control, on several occasions.[7]

Another aspect, which can be noticed after analyzing the two graphs, is the large number of decisions given in the period 1992-1999 on certain provisions of the 1969 Criminal Code, to the detriment of the rules of criminal procedure. At least in the first years of activity of the Constitutional Code, we find decisions to admit the unconstitutionality of some provisions of the special part of the Criminal Code, which included the regulation of different crimes, such as: offenses against the public wealth – 7 decisions, offense against the heritage – 4 decisions, offenses on duty – 3 decisions, crimes against dignity – 1 decision, crimes against authority – 1 decision. Also, there were brought to the attention of the constitutional judgesprovisions of the general part of the 1969 Criminal Code, which targeted institutions such as: conditional release, conditional suspension, suspension under supervision. The intervention of the Constitutional Court on them was a good one, since in the new regulation of the Criminal Code, in force since February 1st, 2014, we no longer find these institutions subject to constitutionality control. Starting with 2000 and until September, 2019, the activity of the Court in criminal matters focused on the criminal procedure regulations, being targeted: the remedies, both ordinary and extraordinary ones, the means of proof, the insurance measures, the reparation of the damage or the moral damage in the case of wrongfully convicted or illegally deprived or restricted, extended confiscation, but also some new institutions: the procedure for recognizing the guilt, the preliminary chamber procedure.

In the case of *a posteriori* control of constitutionality, among the techniques used by the constitutional court to ensure the dissemination of constitutional regulations in the matter

[7]Constitutional Court Decision No. 361 of May 7, 2015, Official JournalNo.419 of June 12,2015; Constitutional Court DecisionNo.740 of November 3, 2015, Official JournalNo.927 ofDecember 15,2015; Constitutional Court Decision No. 22 of January17, 2017, Official Journal No. 159 of March 3,2017.

of criminal law, we retain that of interpretative decisions, often found in the law practice of the Constitutional Court of Romania.

Of the decisions with reservation of interpretation pronounced on the way of *a posteriori* control by the Constitutional Court of Romania in the matter of criminal law, two major categories were retained:

1. Decisions establishing the constitutionality of the criticized criminal regulations, to the extent that they are interpreted in a certain sense.
2. Decisions establishing the unconstitutionality of the criticized criminal regulations, to the extent that they are interpreted in a certain sense.

It should be mentioned that we found that most of the provisions criticized for unconstitutionality were agreed with the decisions of the Constitutional Court (January – June, 2016) through the Government Ordinance of Emergency No.18/2016[8]and later through the Government Ordinance of Emergency No.70/2016, 13/2017, 14/2017.

In our opinion, the changes made to the Criminal Procedure Code or the Criminal Code by the aforementioned ordinances were determined by the other needs, such as:

– the necessity of transposing some Community acts with an impact on both the substantive criminal law and the criminal procedure law – by increasing the guarantees offered in the judicial proceedings, compared to some directives, there being in fact, infringement procedures in the advanced phase[9].

– the possibility of different interpretations in the law practice regarding the applicable criminal procedural regulations, which may affect the fundamental rights and freedoms of the citizens, due to the relatively large number of regulations declared unconstitutional that have not been agreed with the fundamental law, although the term of 45 days provided by article 147 paragraph 1 of the Constitution was expired.

At the law practice level, the main effects of the interpretative decisions in the process of constitutionalization of criminal law were analyzed, namely: as a direct effect, the

[8]Governement Ordinance of Emergence No. 18/2016 for amending and supplementing Law No. 286/2009 regarding the Criminal Code, Law No. 135/2010 regarding the Criminal Procedure Code, as well as for the completion of art. 31 paragraph 1 of Law No. 304/2004 regarding the judicial organization, published in the Official Journal No. 389 of May 23, 2016.

[9]The European Commission, accordingto art. 17 of the Treaty of European Union, aims to ensure the application of the treaties by the States that have ratified them, the measures adopted by the institutions for this purpose and also supervises the application of EU law under the control of the European Union Court of Justice. The „infringment" procedure is initiated by the Commission against states that do not comply withtheirCommunityobligations in certainsituations.

adaptation of the branch of criminal law to the constitutional control, and as indirect effect resulting from it, the uniformization of the application and interpretation of criminal law.

The entry into force of the new codes did not mean that the mission of the Constitutional Court was completed, but on the contrary it adopted a relatively large number of decisions, which produced a significant impact on the two codes in force, generating a new legislative intervention on important institutions, such as: the participation of the prosecutor or of some parties in the criminal process at some procedural stages, the procedure for resolving the complaint against the prosecutor's solutions, the procedure for recognition of the guilt, the need to regulate remedies, the need to draft clear and predictable regulations, clarification some competences, renouncing of criminal prosecution.

Adapting the branch of criminal law to the constitutional regulations represents a direct effect of its constitutionalization and from our point of view it is realized through three ways: finding the unconstitutionality of the criminal regulations contrary to the Constitution, elaborating new criminal regulations based on the existing ones declared unconstitutional and interpreting the regulations to make them comply with the Constitution. The first two modalities are indispensably related to each other and even follow one another, considering the mechanism provided by article 147 paragraph 1 of the Constitution which obliges the legislator to adopt a new solution, either by modifying the existing one or by elaborating a new one that no longer contains the constitutional defects reported in respect of the respective regulation. The last modality can be realized separately, in this case an important role returning to the constitutional judges and to the interpretative decisions made by them, as we have shown previously.

Another observed effect was that of unifying the branch of criminal law in the sense of creating a common language valid at the level of the whole branch. This standardization does not mean that the branch of criminal law becomes devoid of the particularities specific to the branch, only that each regulation or principle of criminal law produces its effects in a constitutional context under the sanction of its invalidity.

It is true that certain regulations and principles of the branch of criminal law have lost their autonomy and exclusivity in favor of constitutional regulations and principles.[10]In this sense we can remember: the principle of non-retroactivity of the law, except for the more favorable criminal law, the principle of guaranteeing the right to defense, the presumption of innocence, the fairness and the reasonable term of the criminal trial.

[10] V.Atilla, *Constituționalizarea dreptului*, inTransilvanian Journal of Administrative Sciences, IX, 2003, p.113.

From our point of view, the uniformization of the application of criminal law is realized in two ways: either by the practical transposition of the decision of interpretation of the Constitutional Court by the courts and even by the criminal investigation bodies, or by transposition of the law practice of the Constitutional Court by the intervention of the legislative power that makes changes or complements deficiencies at criminal regulations level, following which the courts subsequently apply the modified law.

Like any legal phenomenon, the constitutionalization of criminal law has also produced effect at the published literature level, which can be observed especially in the recent published literature, even if they are monographs, theoretical studies, articles, etc. A first effect is observed regarding the change in the way of dealing with the fundamental principles of criminal law, which have undergone an extension, among them being those that have been given constitutional value. Constitutional value means the same level of guarantee, namely of protection, but without the principle appearing *expressisverbis* in the regulations of the fundamental law[11].If, at first, some authors, such as ProfessorDongoroz[12], believed that only a few fundamental principles of the legal system in general, such as the principle of democracy, the principle of legality and the principle of humanism, should be included in this framework, then the idea that within the fundamental principles must be included not only common principles to the entire law system, but also some principles inherent to criminal law, as a branch of law, because they just illustrate the specificity of the legal criminal regulation. Thus, Professor C. Bulai[13]considered that the principle of legality of criminality, the principle of equality before the criminal law, the principle of humanism, the principle of preventing the facts provided by the criminal law, the crime as the sole basis of criminal liability, the personality of criminal liability, individualizing the criminal punishments, would be fundamental for the criminal law.

This reconsideration of the fundamental principles of criminal law is mostly due to the changes made by the Romanian legislator to the Criminal Code and Criminal Procedure Code.

The 1968 Criminal Procedure Code provided in articles 2-8 the following fundamental principles of the criminal process: legality and officiality of the process, finding

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[11] A.Iftimiei, *Constituționalizarea în dreptul penal român și francez,* Universul Juridic Publishing, Bucharest, 2016, p.180.

[12] V. Dongoroz, S.Kahane, G. Antoniu, C.Bulai, N.Iliescu, R.Stănoiu, *Explicații teoretice ale Codului de procedură penală.Partea generală,* vol.I, Academiei Republicii Socialiste România Publishing, Bucharest, 1975, p.28.

[13] C.Bulai, B.N.Bulai, *Manual de drept penal.Partea generală,* Universul Juridic Publishing, Bucharest, 2007, p.57.

the truth, active role, guaranteeing the person's freedom, respecting human dignity, presumption of innocence, guaranteeing the right to defense, the language in which the criminal proceedings are conducted and the use of the official language by translator. Most of these are also resumed by Law No.135/2010 on the Criminal Procedure Code[14], which lists, in the general part, title I, articles 2-13, the principles and limits of the application of the criminal procedure law, namely: the legality of the criminal proceedings, separation of judicial functions, presumption of innocence, finding the truth, ne bis in idem, the obligation to start and exercise criminal action, the fairness and the reasonable term of the criminal trial, the right to freedom and security, the right to defense, respect for human life and respect for privacy, the official language and the right to a translator, the application of the criminal procedure law in time and space.

We observe an enlargement of the framework of these principles, by including some principles guaranteed by the ECHR since 1952, such as the fairness and the reasonable term of the criminal trial.

Law No. 286/2009 on the Criminal Code[15]established in the title I, chapter 1, articles 1-2 entitled the general principles, the followings: the legality of the incrimination and the legality of the sanctions of criminal law. The regulation of these principles, on one hand, as first provisions of this Criminal Code, and, on the other hand, through a broader regulation in relation to article 2 of the 1969 Criminal Code, has both the symbolic value of to reveal the primordial place of the principles of the legality of incrimination and the legality of the sanctions of criminal law, as well as the practical value of placing the non-retroactivity of the criminal law within the provisions provided to these principles.[16]

Given these changes at legislative level, the published literature has reconsidered its position, and at present we find in the category of the fundamental principles of criminal law the following principles: the principle of legality, the principle of equality before the criminal law, the presumption of innocence, the principle of humanism, the crime is the sole base of criminal liability, the principle of the personality of criminal liability, the principle of individualizing the sanctions of criminal law, guaranteeing the right to defense, guaranteeing the right to a fair trial and solving cases within a reasonable time.

As can be observed most of the fundamental principles of criminal law are constitutional principles, with the exception of the principle of humanism, the principle of

[14]Published in the Official Journal No. 486 of July 15, 2010, with subsequent amendments and completions.
[15]Published in the Official Journal No. 510 of July 24, 2009, with subsequent amendments and completions.
[16] A. Vlăsceanu, A.Barbu, *Noul Cod penal comentat prin raportare la Codul penal anterior*, Hamangiu Publishing, Bucharest, 2014, p.14.

personality of criminal liability, the principle of individualizing criminal liability and crime is the only base of criminal liability, which are the principles of the branch of criminal law.

If the sphere of principles is enlarged, the notion of criminal law is restricted to the criminal disposition contained in an organic law, being excluded the possibility that the ordinary decrees and laws may still contain criminal provisions.[17]In this respect, the published literature also folds itself, offering a new classification of criminal laws.

If until now, the perpetrators of criminal law and criminal procedure law were referring in analyzing the principles or institutions of criminal law and criminal procedure law only to the ECHR law practice or to the guidance decisions of the High Court of Justice, now we find more and more references to the interpretation decisions of the Constitutional Court or to simple decisions to ascertain the constitutionality or unconstitutionality of a legal regulation. Even the commented codes include more and more references to the law practice of the Constitutional Court and not just to the High Court of Justice or ECHR law practice.

The thesis ends with a series of considerations.

## 2. The conclusions of the doctoral thesis

In 1988, when French author Danièle Mayer wrote the phrase „*French criminal law was predestined to open to constitutional law*"[18], she could not imagine at that time how criminal law would follow this movement.

Today we appreciate that this movement not only marked French criminal law, but also Romanian criminal law, as criminal law is not only a constraint on human rights and fundamental freedoms, but it is essential for establishing the limits of their existence, given that there can be no satisfactory balance between repressive effectiveness and respect for people.

The constitutionalization of the branch of criminal law in Romania took place gradually, during the 27 years since the establishment of the constitutional court, with effects, as we have shown, on three levels: on the legislative plan, on the practice law plan and on the published literature plan. Thus, in the legislative plan, the constitutional court intervenes in the process of elaborating the criminal regulations, censures the law that is subject to the

[17] C.Butiuc, *Conceptul de „lege penală",* in Criminal law review,year X, No. 2, April-June, Bucharest, 2003, p.51. Also, according to art. 173 of Law No. 286/2009 on the criminal code „*by criminal law is understoof any provision of criminal character contained in organic laws, emergency ordinances or other normative acts that at the date of their adoption has the power of law*".

[18]Danièle Mayer, *L`apport du droit constitutionnel au droit penal en France,* Revue de science criminalle et de droit penal compare, 1988, p.439.

constitutional control, modifies its content or imposes strict requirement regarding its drafting. Often, the Constitutional Court achieves more than a mere attestation of the conformity of the contested criminal regulations with the Constitution. By the decisions it pronounces, the constitutional court establishes principle and rules, delimits competences of public authorities, provides guidelines and solutions on how to interpret the Constitution, the non-constitutional law, so that it is in accordance with the rules of the Fundamental Law and it even ”corrects” in relation to the constitutional regulations, legislatives omissions through interpretative decisions.

Through the mechanism provided by article 147 paragraph 1 of the Constitutions, in order to avoid the appearance of a possible legislative vacuum, the legislator is forced in criminal matters to adopt a new solution, either by modifying the existing one or by elaborating a new regulation, whichno longer contains the defect of constitutionality indicated in the decisions listed above, in a manner that corresponds to those established by the Constitutional Court. As we have shown, one of the main effects at the legislative level is the process of harmonizing the criminal law in relation to the provisions of the Constitution, which includes several legislative changes, obviously positive such as: the emergence of new incriminations, the production and regulation of new institutions reordering the social values protected by the restructuring of criminal laws.

In law practice, the process of constitutionalizing the criminal law has the effect of unifying the branch of criminal law in the sense of creating a common language valid at the level of the whole branch. This standardization does not mean that the branch of criminal law becomes devoid of the particularities specific to the branch, only that each norm or principle of criminal law produces its effects in a constitutional context under the sanction of its invalidity. From our point of view, the uniformization of the application of the criminal law was achieved in two ways: either by the practical implementation of the decisions of interpretation of the Constitutional Court by the courts and even by the criminal investigation bodies, or by the transposition in practice of the law practice of the Constitutional Court through the intervention of the legislative power that makes changes or complements deficiencies in the level of criminal regulations, following which the courts subsequently apply the laws thus modified.

The uniformization of criminal law by aligning it with the provisions of the Fundamental Law is reflected as we have observed, especially in the practice of the courts, which in the activity they carry out implement the decisions of the constitutional court, in the same way in similar cases, using most of them, or in reasons, the arguments brought by the

Constitutional Court. This also applies to the High Court of Justice, which has the task of establishing a unitary way of interpreting the criminal law. The fact that a decision rendered in an appeal in the interest of the law gives a legal text a certain interpretation is not likely to be converted into a fine of non-compulsion which obliges the Constitutional Court, in spite of its role as guarantor of the supremacy,not to analyze the text in question in the interpretation given by the supreme court. From the perspective of referring to the provisions of the Constitution, the Constitutional Court verifies the constitutionality of the legal texts applicable in the interpretation enshrined through the appeals in the interest of the law. To admit a contrary thesis is contrary to the very reason of the existence of the Constitutional Court, which would deny its constitutional role by accepting that a legal text should apply within limits that could collide with the Fundamental Law.[19]

On the other hand, even if, by a decision pronounced in the resolution of an appeal in the interest of the law, the supreme court gives a compulsory decree regarding the interpretation and application of the legal regulation, it does not mean that the Constitutional Court cannot examine the constitutionality of the regulation, in the interpretation thus established.

On the published literature level, as we have observed, two phenomena occur: the first would be the participation of the published literature in the formation of a true constitutional law practice either through informal consultation of some professors, experts in the matter, or by considering the published literature in the decisions of the constitutional court. The second effect in the published literature plane, can be observed, regarding the change of the way of treating some principles, institutions of criminal law or criminal procedure law, following the law practice of the Constitutional Court.

If we were to establish which of the three levels, legislative, law practice or published literature, have the most effects as a result of the process of constitutionalization of the branch of criminal law, we do not think that a quantitative differentiation could be made with respect to any of them. The effects occur, in our opinion, concurrently on all three levels, even if some of them are less visible.

[19] Constitutional Court Decision No. 838 of June 23, 2011, Official Journal No. 648 of September 12, 2011.