

THE INFLUENCE OF THE ROMANIAN CONSTITUTION AND OF THE DECISIONS OF THE CONSTITUTIONAL COURT IN THE DYNAMICS OF THE EVOLUTIONARY PROCESS OF CRIMINAL LEGISLATION

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Abstract

One of the major accomplishments of the Romanian society after the year 1989 was not only regaining the human dignity, the rights and liberties of the citizens, but also the free development of the human character and personality among the fundamental values which govern the Romanian state. The need that those values should be conferred a supreme force, has determined the legislator to mention them in the very first texts of the Constitution from 1991. Moreover, having acknowledged Romania's international isolation at the time, the Constituent Gathering opened – by means of constitutional measures – its gates and created the premises for the integration in the international society, by among other things, guaranteeing the protection of the human rights and liberties in accordance with the international treaties to which Romania is a signatory party¹.

Keywords: Constitution; penal law; human rights; jurisprudence; The Constitutional Court of Romania

It is worth mentioning from the very beginning that the new penal legislation which has to be aligned to the current demands of the modern society, would inevitably raise the issue of the relation between the fundamental law and penal law. While the Constitution reflects, undoubtedly, the will of the citizens to submit the entire social and economic life to the basis of the democratic principles and market economy, the current penal law which was adopted almost 12 years ago, reflects, according to some authors, both the national and the European penal political views².

Therefore, it would be justified, on the one hand, that, in line with the Constitution, some appropriate changes should be made to the penal law in order to reconcile it with the constitutional principles.

¹ I. Vida, *Jurisprudența Curții Constituționale și Convenția Europeană a drepturilor omului 1994-2003*, Regia Autonomă Monitorul Oficial, p. 914.

² H. Labayle, *L'application du Titre VI et la matière pénale*, in *Revue de droit pénal et de Sciences criminelles*, 1995, p. 48 and the following, *apud* J. Pradel, G. Corstens, *Droit pénal européen*, ed. a 2-a, Ed. Dalloz, Paris, 2002, p. 6.

On the other hand, there are arguments³ that this alignment is not necessary and that a new penal regulation would automatically come into existence, through the implicit obligation to interpret the penal dispositions in total agreement with the constitutional principles; where this were not possible, the penal disposition which opposes the Constitution would be implicitly considered *repealed*.

If there were any doubts related to the contradiction between the actual penal law and the constitutional dispositions, this would be brought to the Constitutional Court on the exception of the unconstitutionality of the law, the Constitutional Court having to decide upon the already mentioned exceptions.

In such a situation, the constitutional norms would immediately be applicable, allowing for an absence of any normative acts that translate the will of the ordinary penal law constituent corresponding to this will.

This point of view would oppose that which considers that the constitutional norm is an exclusively programmatic norm, containing only tasks for the future legislator, and, therefore, impossible to be put into practice immediately⁴.

As it is well known, in trying to put into practice all its attributions, the Court releases decisions, resolutions and notices, the first two categories having a compulsory character. This character is supported by the practice of the Constitutional Court which explains the effects of its acts through their own means⁵.

The main purpose of a Constitutional Court is that of controlling the constitutionality of the law, or, to put it in other words, to make sure the law is always in line with the Constitution. Maintaining the general character of the decisions, a guarantee of the judicial security, the Constitutional Court is bound to conform to its own decisions. Nevertheless, it is believed that an absolute stability would produce a rigid, unacceptable judicial paradigm, the Court having the possibility to practice the jurisprudential revival in accordance with art. 29 para. 3 from Law no. 47/1992 regarding the organization and functioning of the Constitutional Court, which mentions that “the legal stipulations found to be unconstitutional cannot be regarded as exception through a previous decision of the Constitutional Court”, which means, *per a contrario*, that the stipulations found constitutional may be the object of this kind of control⁶.

It cannot be argued, in our view, that the constitutional norms would be entirely programmatic without any immediate effect, because this would contradict the stipulations in the Constitution, which state that the laws and all the other normative acts remain actual, as long as they do go against the present Constitution⁷.

³ G. Antoniu, *Reforma penală și Constituția*, in Revista de drept penal nr. 1, Bucharest, 1996, pp. 17-24.

⁴ G. Bettiol, *Diritto penale: Parte generale*, Padova, 1973, p. 41.

⁵ G. Antoniu, *Reforma penală și Constituția*, in Revista de drept penal nr. 1, București, anul 1996, pp. 17-24.

⁶ L.D. Stanciu, M. Safta, *Deciziile Curții Constituționale, factor de stabilitate și securitate juridică*, in the volume *Un sfert de secol de constituționalism*, p. 235 and the following.

⁷ G. Antoniu, *Reforma penală și Constituția*, *supra*, pp. 17-24.

We can notice that the Romanian constituent legislator has put himself in a neutral position, accepting some of the immediate effects of the Constitution, as implicit repeals from the previous law's contrary to the Constitution. The stipulations which offer the Constitutional Court the right to decide upon the exceptions raised before the court regarding the unconstitutionality of the laws can be interpreted in the same way.

These stipulations would have the purpose to solve the possible misunderstandings regarding the implicit repeal or the remaining of some of the stipulations of the previous penal law as long as they were part of an exception of unconstitutionality before the courts⁸. However, these immediate effects are limited.

As long as we still accept as valid the conclusion that not all constitutional stipulations with penal implications are of immediate application, there remains a large area in which the penal ordinary legislator, thus, implicitly a large area of activity for the evolution of the penal law in accordance with the stipulations of the Constitution.

However, the issue of congruence of the penal law with the stipulations of the Constitution in the context of a potential future penal reform requires an answer related to the extent to which the Constitution may influence the evolution of the penal law. On this issue, there may be at least two ways possible approaches. From one perspective, the Constitution may comprise of an explicit or implicit enumeration of all the fundamental social values that the law defends. Beyond those, the legislator could not extend his defense. Among these social values, the penal legislator will also select the ones that they will eventually defend by means of the penal constraint.

Moreover, the hierarchy of these values would be established according to the Constitution, and the assignment of punishments would bear in mind the order of importance of the protected values and the meaning granted to these by the Constitution.

The social values protected by the penal law could be considered as primary as long as they are accurately and implicitly enumerated by the Constitution and as secondary, to the extent to which, even not mentioned by the Constitution, they are not incompatible with it. It is possible, though, that the protection of a primary social value to be in contradiction with the protection of other values. For example, the protection of the liberty of a person may interfere with the protection of another primary value *e.g.*, the rightful order, because the citizens have the duty to respect the laws. This may lead to sacrificing individual liberty when a person loses their freedom because they broke the law. If it were to be justified that in the name of some superior commandments to sacrifice a primary social value, (the individual liberty)⁹ in order to keep another equally important value (the rightful order), would it

⁸ G. Bettiol, *supra*, p. 41.

⁹ A.M. Naschitz, *Teorie și tehnică în procesul de creare a dreptului*, Bucharest, Ed. Academiei, 1969, pp. 15-17.

equally justified to sacrifice a the primary social value for the protection of a secondary one¹⁰ (for instance, the liberty of the individual to be sacrificed¹¹ in order for the public trust to be protected, a social value not mentioned by the constitution but which is not incompatible with it)?

The same question applies to whether it would be possible to sacrifice the liberty of a person in order to protect the rules of social cohabitation (to decide on the deprivation of liberty for crimes such as assault against good conduct or disorderly conduct). If the answer to these questions was negative, it would mean that the ordinary legislator could not use sanctions including the deprivation of liberty except for severe crimes against the primary social values¹².

The same goes in the case in which the primary constitutional values should be perceived as being fixed once and for all, unsusceptible to any interpretation or any conflict of opinions. In such a situation, the ordinary penal legislator would only have the possibility to defend and preserve those against any and, consequently, could not be perceived as flexible, susceptible to nuances or problematizations in relation to the ever-changing realities. To put it in other words, these values may represent a locked house (fortress) that those inside have the duty to protect against all attacks and could not be perceived as a forum in which interpretations and debates can be permitted¹³.

A second perspective¹⁴, which seems a little bit more realistic to us, the Constitution does not comprise of a numerous inventory of the protected social values and, therefore, does not impose to the penal legislator a limited area – of concerns in this matter and does not even determine the way in which these values should be protected.

The role of the Constitution is that of establishing the fundamental principles according to which a state should be organized and at the same time to state the fundamental rights and obligations of the citizens. The latter one (art. 15-57 from the Constitution) represents but a small part (less than a third) of the Constitutional stipulations (a total of 156 articles) and refers only to some of the fundamental social values susceptible to be protected through the penal law and are those strictly referring to fundamental rights and obligations of the citizens.

As a consequence, the Constitution will not comprise of any other social values which are worth protecting through the penal law. For example, the Constitution refers to the dignity of a person but does not make any reference to other social

¹⁰ I. Vîntu, *Les droits et les libertés de l'homme en Roumanie*, in *Revue roumaine des sciences sociales. Série de sciences juridiques*, 1968, no. 1; T. Drăganu, *Drepturile fundamentale ale cetățenilor în Constituția României*, in *Justiția nouă*, 1966, no. 3; E. Feraru, *Inviolabilitatea persoanei – atribut esențial al dreptului la libertate, asigurat și garantat de Constituția României*, in *Revista română de drept*, 1967, no. 2, p. 5.

¹¹ V. Manzini, *Trattato di diritto processuale penale italiano*, vol. I, Torino, 1967, p. 225.

¹² V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roșea, *Explicații teoretice ale Codului penal român*, vol. II, Bucharest, Ed. Academiei, 1970, pp. 274, 284, 239, 246.

¹³ D. Pulitanò, *Bene giuridico e giustizia costituzionale*, in volume *Bene giuridico e riforma della parte speciale*, Napoli, 1985, p. 159; G. Fiandaca, *op. dr.*, pp. 21-24; J. Seifert, *Haus oder Forum*, Frankfurt am Main, 1979, p. 163, cited by D. Pulitanò, *supra*, p. 159.

¹⁴ G. Antoniu, *Reforma penală și Constituția, supra*, pp. 17-24.

values such as respecting the rules of social cohabitation, public trust in official documents and papers, defending the security of travel by air or public roads etc.

As a result, the Constitution regulates the rights and liberties of the citizens as a counter part of the rights of the public authorities, in order to keep a sensible balance between authority and liberty and to prevent the possible abuse by the authorities; the existence of some fundamental citizen rights which must never be broken opposes to the first¹⁵.

The Constitution comprises not only of the fundamental principles of a state's organization, but also the enumeration of the fundamental social values that the ordinary legislator must take into account when establishing the ordinary judicial norms. Among these values one may find the ones that impose the protection of the penal law such as: the existence of the state, sovereignty, independence, state unity, the fundamental human rights, property and all the forms this may take.

Moreover, the Constitution clarifies what the fundamental rights of the citizens are as well as the means to enforce the constitutional order. The role of the penal law as protector of the constitutional values emphasizes the strong connections between the penal and constitutional law, and the interdependence of these fields of law.

Equally, one may not confer to the constitutional values a rigid character, unsusceptible of any nuances and clarifications facilitated by ordinary law, in direct congruence to the various needs of the members of society.

But if the Constitution, as an outcome political compromise, cannot impose onto the legislator a fixed scale of values and a hierarchy, it does not necessarily mean that they cannot extract from the constitution certain decisive directions in order to perfect the penal law¹⁶.

As a result, out of the constituent to demarcate as accurately as possible the rights of the individual from those of the authorities and to prevent the interference of the state in the field of the rights and liberties of the individual, the penal legislator must understand to protect with maximum efficiency those liberties from being broken either by other citizens or by the authorities themselves. Any limitations of these rights, in order to ensure the well-being of all citizens, must be conceived in such a way so that not to exceed the limits of the necessity. The use so of the penal law to introduce these limitations must represent *ultima ratio (extrema ratio)*, meaning that they are acceptable only when other means become inefficient in protecting social values¹⁷.

The legislator will not make use of the penal law for the purpose of defending social values, should that be possible by means of other judicial norms¹⁸. Although some authors may manifest a certain hesitation towards the penal law, criticizing its

¹⁵ V. Dongoroz *et al.*, *Explicații teoretice ale Codului penal român, partea generală*, vol. I, Ed. Academiei Române, 1969, p.10.

¹⁶ G. Antoniu, *Tratat de drept penal*, vol. I, Universul Juridic Publishing House, Bucharest, 2015, p. 23.

¹⁷ *Ibidem*, p. 53.

¹⁸ V. Dongoroz *et al.*, *Explicații teoretice ale Codului penal român, partea generală, supra*, p. 15.

severity and repressiveness, the reality shows that so far, nothing better to ensure the protection of the fundamental social values has been found. Only the penal law makes it possible to overcome the dangerous conduct towards these values, along with the permanent demand that the members of the society should willingly respect the basic rules of common cohabitation¹⁹. To the extent to which the uncommon behavior of the citizens may be prevented or overcome with other legal means, these should be mainly used, especially if they do not bring any harm to the individual liberty. Any excessive use of penal law in such situations, beyond necessity is inconvenient and, since it surpasses the principle of economic repression (*nulla poena sine crimine et necessitate*), it unjustifiably amplifies the cost of the crime that the society has to bear²⁰. *Nulla poena sine lege* implies that for committing any crime only the punishment stipulated by the law for that very crime can be applied and only in the conditions stipulated by the law. The legal norm which incriminates the crimes must therefore make reference to the punishment which is to be applied to that specific crime and to accurately specify the nature of the specified punishment. Thus, there is an obligation of the ordinary legislator to make a rigorous selection of the incriminated crimes, giving up some of them (especially the not so serious ones), for example by extending the field of misdemeanors.

Some have even suggested that the issue of excessive repression could be raised to the Constitutional Court, due to a breach of the principle of proportionality between the abstract severeness of the crimes and the use penal sanctions, so that some penal stipulations can be rendered unconstitutional. In this case some authors²¹ wonder whether the legislator should be required to provide evidence that other more efficient measures to combat these crimes could not be imposed, or whether this should be the duty of those who notify the Constitutional Court.

In favor of the first solution would be the argument that the demand of the necessity refers to the penal law and, consequently, it must be proved by the legislator and if the evidence is not convincing, it definitely must be acknowledged as unconstitutional.

In terms of arguments in favor of the second solution would be the fact that the law is assumed to be formally valid (necessary) as long as it is not declared unconstitutional and therefore the lack of its necessity should be proved by those who make the claim, by proving the efficiency of other sanctions²². The penal legislator should also extract from the constitutional stipulations the obligation to ensure an equal protection of the citizens not only against the abuse from the authorities, but also against the illegal, abusive crimes

¹⁹ V. Manzini, *Trattato di diritto processuale penale italiano*, vol. I, Torino, 1967, p. 62.

²⁰ V. Dongoroz *et al.*, *Modificările aduse Codului penal și Codului de procedură penală prin actele normative din anii 1956-1960*, Bucharest, Ed. Academiei, 1962, p. 26.

²¹ G. Antoniu, *Reforma penală și Constituția*, *supra*, p. 20.

²² F. Angioni, *Bene costituzionali e criteri orientativi sull'area dell'illecito penale*, in *Bene giuridico e riforma della parte speciale*, Napoli, 1985, p. 111; C. Gallwas, *Strafnormen als Grundrechtsproblem*, Berlin, 1969, p. 895, Johannes Wessels, *Strafrecht Allgemeiner Teil*, Heidelberg, 1995, pp. 2-3.

committed by other citizens. The victims of individualistic, exaggerated behavior deserve the protection of the penal law in exactly the same way as those in conflict with the authorities, because the constituent does not impose limits in protecting the fundamental rights and liberties of the citizens to only some categories of citizens.

Under both aspects, a sensible assessment of the penal sanctions and a proper proportionality become necessary so that, on the one hand, to create the appropriate inhibiting factors in the consciousness of those who might try to break the law, and on the other hand, to reinforce the sense of security in other citizens, making them acknowledge that the law really protects them and should, by no means, pursue justice on their own²³.

As long as the constitution has taken into account some fundamental social values, the penal law should ensure their appropriate protection. In this context, we can make reference to the social values outlined by the Romanian state (sovereignty, independence, unity, indivisibility, democratic character), to the protection of the citizens (life, body integrity, health, dignity, the rights and liberty of the citizen, equality in front of the law), and of the private and public property.

Equally, the penal law must protect the social values which only implicitly derive from the Constitution (*e.g.*, sexual inviolability of the human) or those which, even not mentioned in the Constitution, are of real importance for the social life and are not incompatible with constitutional stipulations (*e.g.*, compliance with the rules of social living, the military order and discipline, public trust in evidence etc.).

Special attention must be given to those incriminations that, not only have no equivalence in the implicit or explicit stipulations of the Constitution, but also, from a certain perspective, may even seem incompatible with the Constitution.

Firstly, we may want to refer here to the so-called opinion crimes, which translates into the incriminations regarding the expressing of certain individual beliefs.

According to the art. 29 from the Constitution, the freedom of thought and of opinion and also the freedom of religious beliefs can be, under no circumstances, limited. Nobody can be forced to embrace an opinion or to adopt a religious belief against their will. The limitation of these liberties can only be justified in case of defending national security, public order and morals, or the rights and liberties of the citizens. This means that the penal law must be extremely careful when criminalising speech, propaganda, or the expression of some personal beliefs. The penal constraint is justified only when other, less severe measures did not work. The public authority has the means to contain the spread of certain ideas that may disturb public order (*e.g.*, by preventing their release or dissemination), or to promptly combat them by providing a justified answer against them.

Moreover, there is the possibility of immediate sanctions against those who, by means of the ideas they spread, can endanger the public order and morals, disturb public order etc. On this point, it is worth considering whether a broader articulation

²³ G. Fiandaca, *supra*, pp. 24-25.

of exceptional circumstances that require criminalisation is justified, which can replace different justifications for criminalising thought-related acts.

Another category of incriminations whose compatibility with the Constitution is very debatable, would be that of the crimes related to behaviour. In this particular case, the penal law incriminates not an action or an inaction, but more the way a person leads their existence (usually in an immoral or parasitary way), in total contradiction with the dominant ethical conceptions of the society (*e.g.*, organizing gambling games with the sole purpose of earning illegal revenues etc.).

In a society which respects the rights of the individual very closely and limits the intervention of the state in their private life, one may state that there is no ground for using the penal law to force the citizens to follow a certain moral behaviour. It has been argued²⁴ that any obligation that should be imposed to the citizen to be righteous, brings offence to their inner liberty.

The public authority can and must instill the necessity of a moral attitude among citizens, but cannot force somebody to be righteous. It has also been brought into discussion the argument that the behavioural deeds are related to a way of living the subject has willingly chosen, even when exposing oneself to public judgement, including the risk of being marginalized, which means being exposed to some social and moral sanctions. Given that the behaviour of the subject is under the scrutiny and judgement of all citizens, which exerts a mental pressure on the individual, it would no longer be necessary to impose an educational preventive intervention from the authorities by using the penal constraint.

In the opinion of modern doctrine, the democratic state, based on the rule of law, on pluralism and ideological tolerance, cannot pursue the moral improvement of its adult citizens, cannot sanction any immoral form of conduct, but only the acts that lead to endangering the general good, preventing the wellbeing and the peaceful cohabitation of the members of society. In such case, the punishment cannot be justified in order to impose the respect of some moral conceptions, because the penal constraint has the purpose to ensure only the essential life conditions and the peaceful collaboration of the citizens²⁵.

Last but not least, there exist doubts relating to the compatibility with the Constitution of the so-called abstract²⁶ danger crimes and, generally speaking, the incriminations in which the legislator manifests a rather exaggerated concern about preventing a crime, incriminating some acts that have very far and impossible to assess consequences (*e.g.*, related to the circulation on public roads or incriminating some omissible activities).

²⁴ G. Bettioli, *supra*, pp. 40-41; G. Fiandaca, *supra*, p. 37, not only does the author argue that the penal law is not a tutor or virtue, but also it dispels the public immorality which resulted from some dangerous antisocial behaviour.

²⁵ G. Fiandaca, *Il bene giuridico come problema teorico e come criterio di politica criminale*, in *Bene giuridico e riforma della parte speciale*, Napoli, 1985, pp. 8-10; R. Claus, *Strafrechtliche Grundlagen Probleme*, Bonn, 1973, p. 1.

²⁶ F. Mantovani, *Diritto penale, parte generale*, 2nd ed., Padova, 1988, p. 226; D. Pulitanò, *supra*, pp. 165-168; F. Angioni, *supra*, pp. 73-75.

If a society based on economic, political, social liberalism is hostile towards any kind of intervention of the authorities through the penal law unless an actual dangerous social outcome has been produced, the more it opposes a pre-emptive protection of social values, suspecting the authority that it willingly overstates the danger of some acts, so as to have a pretext to restrict individual liberty and to subject the individual to the excessive control of the authorities.

The excess of anticipated guardianship can lead to the criminalisation of not so much antisocial conduct but of the mere disobedience to the will of the legislator, which represents in fact the criminalisation of the state of danger of the actor. In order to avoid these consequences which would turn the penal law into an instrument of illegitimate coercion, the penal legislator must accurately and fairly assess the extent to which some social values should be protected with anticipation, based on realistic estimates of likelihood that dangerous outcomes might emerge²⁷.

But the alignment between the penal law and the stipulations of the constitution cannot be perceived only as a passive translation of the constitution into the penal law, the latter being viewed as an instrument for the protection and consolidation of the fundamental social values stipulated explicitly and implicitly by the Constitution (which would reflect the conservative role of the penal law). Alternatively, we can also take into consideration the alignment between the penal law with the constitution through the manifestation of the active role of the constitution, as the supporter of the penal law, which means that the penal legislator should reformulate some of the incriminations or to introduce new incriminations or to bring changes to the system of punishments so as to put into practice the new innovative ideas in the Constitution, to which to ensure a penal counterpart. In this situation, the penal legislator would not limit itself to a passive role of using the penal constraint in order to establish, protect the constitutional values, but would try to extract from all the constitutional stipulations some new points of view, which would actively be supported in the field of penal law.

If in principle, theoretically speaking, such a way to understand the accordance between the penal law and the Constitution would not meet any objections, there is scope to reflect upon the limits within which this active role of the penal law can be manifested.

In conclusion, what is worth emphasising is the role of the Constitutional Court in dissipating into the judicial practice in Romania the national constitutional values and the way in which these values are being aligned to European standards, especially to those enshrined in the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights in Strasbourg²⁸.

²⁷ D. Pulitanò, *supra*, pp. 165-168.

²⁸ T. Toader, M.-I. Michinici, A. Crișu-Ciocîntă, M. Dunea, R. Răducanu, S. Rădulețu, *Noul Cod penal. Comentarii pe articole*, Hamangiu Publishing House, Bucharest, 2014, p. 1, footnote 2; M.A. Hotca, *Manual de drept penal. Partea generală*, 2nd ed., revised and amended, Universul Juridic Publishing House, Bucharest, 2020, p. 18.